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INTERNATIONAL LAW AND THE PRESENT WAR

THE fact that all military aggressions of the last few years have started without a declaration of war is a symbol of considerable importance for the diagnosis of the crisis of international law.

In the first place, it indicates, that the rules of warfare, such as they were, are no longer observed by aggressors, and to that category belongs by now a very considerable part of mankind.

It indicates further the disintegration of a society, at least in the relations between aggressor states and others, which feels bound by any common rules of behaviour. But thirdly: the absence of a declaration of war makes it easier to maintain that state of twilight between peace and war which is so characteristic of the present international situation, and which is in itself, a deadly blow to the established international law. For if anything was elementary in the rudimentary international law which had come to be accepted it was the clear-cut distinction between peace and war, and correspondingly between a law of peace and a law of war.

The absence of such a clear distinction blurs the border line not only between peace and war, but also between internal and international revolution.

Italy, Japan, Germany, Russia, all have in different ways described their aggressive actions as police actions taken to deal

with "incidents," or as a process of getting into contact with the people of another country as distinct from their government. It is a natural consequence of this state of affairs that the border lines between belligerency and neutrality are blurred, and the confusion is heightened by the occasional bursts of activity of a fragmentary League of Nations. Thus it would be difficult to say whether at present Soviet Russia is neutral or not in the war between Germany and the Allies. Russia on the one hand, and Great Britain and France on the other, certainly stand on opposite sides in regard to Finland, but have so far avoided direct hostilities. On the other hand, Russia's relations with Germany fit into no known category of neutrality.

These observations may illustrate the revolutionary character of the problems which face the international lawyer. But before discussing these problems in any more detail, it is essential to be clear about the function which the international lawyer might, and should, exercise at the present day.

Throughout the past decade of intensifying international crises the great majority of international lawyers have persisted in an analytical and static interpretation of international law as it was laid down in customs, conventions and decisions, while international society went through revolutionary changes. That this attitude has not increased the efficiency of international law, or the respect for the science of international law, is beyond doubt, but it is less easy to say what should have been done. The chief difficulty is the absence in international society of a clear-cut indication of any change of law. Within the state society a change of law is indicated by legislative act. Sometimes, in revolutionary periods, a radical breach of the existing law initiates a period of lawlessness until a new law-giving authority establishes itself by what German jurists have called the *Normative Kraft des Faktischen*. But in international society there is no organ of legislation, no body of law reformers as distinct from law interpreters.[1] Indeed, as is recognised by Article 38 of the Statute of the Permanent Court, the science of international law has its share in the sources and thus in the making of international law. But it is a fact of considerable sociological importance that through a long period of comparative social stability and a characteristic self-limitation of a legal profession trained in the security of municipal law, interpretation was considered as the overwhelmingly important, if not the only, task. This, of course, never meant that the interpretation of international law was free from political

[1] Possibilities in that direction, inherent in Art. 38, par. 5 of the Statute of the Permanent Court of International Justice, have not been developed.

prejudice. But such prejudices have been inarticulate and presented under the cloak of scientific interpretation, and they have not helped in any way to widen the outlook of international lawyers so as to make them perceive the perpetual inter-dependence of international law on the one hand and the political, social and economic conditions of international society on the other hand. At times of major crisis the task of analytical interpretation recedes to a very subordinate function and the task of following the essential social developments in their effect upon the law becomes all the more important.

It is, of course, a dangerous thing to leave the relative safety of law interpretation and venture into the sphere of law-making: dangerous both because of the lack of certainty and of the temptation to reduce the law to a mere department of politics. But that is due to the rudimentary state of international society and law which has not yet produced any clear separation of powers. While international society is in this state, the international lawyer cannot help being something of a politician, a sociologist, and an economist. The law will be served better by an open acknowledgment of this fact than by the inarticulate intrusion of such non-legal spheres into the law. The task then is to steer between an international law, which is nothing but political pamphleteering, clothed in technical legal expressions, as in Nazi Germany to-day,[2] and the surfeit of analytical interpretation in which international lawyers in non-totalitarian countries have so much indulged.

How is it possible to distinguish a breach of law from a change in the law, produced by a process corresponding to a legislative repeal in municipal law? This question is strangely unexplored, beyond the general knowledge that a fundamental and radical breach of the existing law when successfully imposed upon a society becomes a source of new law. Now in international society, composed as it is of a limited number of state units and characterised by a wide space of no-man's land, with a limited sphere of international legal relations, there is often a long and uncertain period of transition between the eclipse of one rule of law and the formation of a new one. Not only is it difficult to say at what point a rule of international law, especially a customary one, has ceased to be valid, but it is even more difficult to say when a new practice has hardened into law. Between these two stages lie many transitory ones when an old practice, once universal law, but gradually

[2] A characteristic example is Bockhoff's *Völkerrecht Gegen Bolschevismus* published in 1937 at the height of the anti-Bolshevist campaign, and now banned in Germany as an obstacle in the relations between Germany and Russia.

abandoned by a large part of international society, fades away and a new practice has not yet spread sufficiently or become definite enough to crystallise into a rule of law.[3] Hence the activity of an international lawyer must be so much more tentative, discretionary, destructive, and creative than that of his colleague who applies a municipal system. Thus it is now universally recognised that a large proportion of the Hague Conventions of 1907 is in fact no longer applied. Those who like to avoid the essential problems may prefer to base the inapplicability upon the absence of ratification of the conventions by some small State (as was done in the last war) or upon the general participation clause which forms part of so many of the Hague Conventions. But the essential problem is surely when and why a Convention ceases to be valid in the absence of such facts. Where a rule is essentially declaratory of existing custom it becomes obsolete with the obsolescence of the custom. Where the rule is created by a law-making treaty, the legal formula to express its obsolescence is probably the *clausula rebus sic stantibus*.[4] Both formulae make it essential to examine when a change of political, social and economic conditions has attained such a degree that it is no longer possible to operate the rule: in fact, the notorious *clausula* can fulfil in this connection a much more useful and honest task than that which it has usually fulfilled, by providing a cloak for the unilateral denunciation of treaties by a party which no longer wishes to be bound by them.

Laws of Warfare

Are there still any laws of warfare? The essence of these rules is restraint in the conduct of war, but it is essential to distinguish between two objects of such laws. One object is the imposition of certain rules of humanity upon an otherwise unbridled violence between the belligerents. Another is the limitation of the scope of warfare, mainly by a distinction between a military and a non-military sphere. The humanisation of war is still possible where it does not interfere with the effective pursuit of the war, and depends merely upon a residue of civilisation and moral restraint in matters like the treatment of captured or wounded enemies. The distinction between military and non-military spheres on the other hand is dependent upon the character and scope of modern war and therefore upon political, social and economic factors

[3] Friedmann, *British Year Book of International Law*, 1938, pp. 118 *et seq.*; Keeton and Schwarzenberger, *Making International Law Work*, p. 189.

[4] Professor McNair in *Law of Treaties*, p. 393, speaks of "desuetude" in regard to bilateral treaties which have ceased to be observed.

which we cannot unmake by a stroke of the pen, and which are bound to affect the law. This is the explanation why so far, at least, there is not much evidence of a wholesale violation of the Geneva Conventions whereas the rules of warfare laid down in the Hague Conventions are so very largely disregarded. In many rules, of course, a certain view of the border line between military and non-military spheres coincides with humanitarian considerations. Wherever that is the case it can safely be said that the modern needs of warfare usually prevail over humanitarian motives.[5]

If we apply these general principles to the position of the laws of warfare in the present war, there is no reason to doubt at all the continued effectiveness of the Geneva Conventions; whereas the majority of the Hague Conventions relating to the conduct of war seem to have fallen a victim to the totalitarian character of warfare. The purpose of war, namely the breaking of the enemy's resistance, is now as much a matter of interfering with the enemy's supplies, production, transport, morale, as it is a matter of military victory. The life of the individual has become part of the political and military effort, and commerce has become a part of politics. This latter fact in particular has obliterated many rules of warfare and of neutrality.

It would, of course, be destructive of any rule of law, if every change in conditions could be adduced as an excuse for a breach of law, and, indeed, a breach of law could be denied on this ground. If Germany to-day bombs civilians, sinks merchant ships at sight, or the Americans claim a neutrality zone of 300 miles, other powers are perfectly entitled to speak of a breach of law and to act accordingly. But the international lawyer should not be content with that. He should distinguish those breaches which arise from sheer contempt for restraint and the rule of law in international relations, from those which are the expression of permanent social and economic changes and therefore likely to be repeated until the old rule has fallen into desuetude through general non-observance. He should then further examine whether the breach of a particular rule prepares the making of a new and different rule, or just a state of lawlessness in which there is neither the restraint nor the general observance which develops a new rule of law. The stopping of all enemy trade, including enemy exports to neutral countries, is a case in point. Until the time appears ripe to state openly that the old rule of contraband has fallen into desuetude, belligerent powers will operate with the

[5] Cf. Smith, *Développement moderne des lois de la guerre maritime* (*Extrait du Recueil des Cours*) 1939, pp. 6 *et seq.*

elastic notion of reprisal to justify this necessary concomitant of modern war.

Finally, an observation on the background of the rules of war, on land and on sea, should precede a discussion of their position in the present war. The object of the war on land is the overpowering of the enemy, his army, his government, his country. Modern technique of war, and the destructive power of modern arms will encourage the disregard of the rules of restraint embodied in the Hague Conventions. The only motives for restraint will be the fear of retaliation, and, to a limited extent, the desire to conserve the resources of a conquered enemy. The latter consideration will hardly operate in relation to a major enemy. Whoever takes the offensive, is likely and almost bound to violate the existing rules, and thus justify reprisals; the reluctance to do so may be one contributing factor to the stalemate in the West.

The position at sea is very different. In most maritime wars, certainly in the last one and the present one, one side has the mastery of the seas, which the other side seeks to destroy. The object of the side in command of the seas is to secure its own communications and commerce, while stopping that of the enemy. As it has been well put, it seeks to destroy property rather than life.[6] It will thus tend to ignore those rules which impose restraint upon the pursuit of the economic war, but not the rules which protect life. The other side, on the other hand, while also pursuing totalitarian economic war, mainly by pressure on neutrals within reach of its armies, will attack the power in command of the sea by all possible means such as unrestricted mine and submarine warfare which threatens life as well as property. Where the laws of sea warfare are essentially suited to the requirements of a power in command of the sea, as is the case with the present law, the more odious kind of unlawful behaviour, the breach of the rules safeguarding life, will therefore come from the power which attacks the command of the sea. There is not the same temptation for the other side, and it is a definite tactical advantage for this side—the Allies in the present as in the last war—that the law supports their type of warfare at sea. But the need for the enemy—Germany—to break that law is so pressing that an observance of the laws of sea warfare by both sides is almost out of the question, and it becomes one of the issues of war, whether the Allies can successfully defend their command of the sea, and with it the existing law, or Germany can successfully defy and destroy both.

(*a*) On land only the Polish war, and lately the Finnish war

[6] H. A. Smith, *Développement moderne des lois de la guerre maritime*, p. 19.

illustrate so far the disregard of most of the customary distinctions between military and non-military objects by totalitarian aggressor states. Where force was sufficiently overwhelming on the attacking side, and ruthlessness seemed likely to achieve the defeat of the enemy country, it was applied. Open towns were bombarded, civilians massacred, property confiscated or destroyed.[7] Where it was not done, the motive was not respect for the law but equality of strength and the fear of retaliation. It may be safely predicted that any major land offensive will be accompanied by similar radical breaches of the Hague rules.

(*b*) At sea the last war brought the elimination, for all practical purposes, of the distinction between contraband and non-contraband, between military and public property of the enemy on one hand, and private enemy-property on the other hand, between military objects and commercial interests. They all came to be considered as part of one political organism, and to participate in the war fully. The present war started where the last one ended, and it would be futile to discuss again what is now commonly known. The abortive Declaration of London, never ratified, was soon abandoned in the last war. No one has since attempted to revive it. But the second Hague Convention, equally violated in the last war, still is law on paper. So is the Declaration of Paris of 1856. Three facts, of different legal importance, seem to stand out, in the sea war, as hitherto conducted—

1. The seizure of enemy-goods on neutral ships by all belligerents, contrary to the Declaration of Paris and regardless of the question whether the enemy-goods are of private or public origin.[8]

2. Unrestricted laying of floating and unanchored mines by Germany, contrary to Convention VIII of 1907.

3. Sinking at sight of enemy merchant-ships (2) by German submarines, contrary to the Treaty of 1930 and the Protocol of 1936 signed by Germany.

For the present position of international law these different violations of established principles are not of equal significance. The first, the comprehensive destruction of enemy commerce, illustrates an economic evolution which is universal, dictated by modern conditions of warfare and the grip of the state on economic life, and in the light of which it is becoming useless to speak of a violation of law. The old law is in process of becoming inoperative

[7] On the different rules of the Hague Conventions thus violated, cf. Oppenheim-Lauterpacht, *International Law*, Vol. II, Chapter III.

[8] Prof. Smith, *loc. cit.*, p. 30, attempts to save the Declaration of Paris by declaring illegal the seizure of "truly private" enemy goods. From those he excludes all goods of which the enemy state controls import and export, price and distribution. No belligerent has attempted to follow this quite impracticable distinction.

through common practice based on a fundamental change of conditions, and the effect is the cessation of a custom or the tacit rescission of a treaty, whichever one prefers.

The laying, by belligerents, of anchored automatic contact mines which break away is not a clear breach of a definite rule of law, although certainly of a rule of morality, because of the notorious clause in Art. 3 of Convention VIII of the Hague Convention, which makes the duty to warn the enemy government of floating mines subject to what the other party considers as "military necessity."[8a]

This is a typical example of spurious law-making by international treaty between irreconcilable conflicting interests[9]; it serves to emphasise the necessity of common interests and values as the basis of law, and of authority and sanction to make law a reality. On the other hand, the sowing of floating mines is a clear breach of Convention XIII. But neither Germany nor France are bound by Art. 2 Convention XIII, which makes it unlawful to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

Unrestricted submarine warfare, on the other hand, is a clear breach of law by Germany, in defiance of an unambiguous obligation undertaken by the present regime, and its open breach serves to illustrate the point made above as well as the depth of the cleavage and of a conflict in which it is made clear that there is no community of values to impose restraint between Nazi Germany and her principal enemy.

(*c*) There is no law of air warfare, but there have been many notable attempts to suggest rules. The essential purpose of these attempts has been to introduce restraint into this most modern and most destructive of all weapons, on land by a re-definition of military objectives and the outlawing of attacks against non-military objectives, at sea by an adaptation of the rules of sea warfare to the nature of air warfare, in such a way that aeroplanes would serve as auxiliaries to warships and be subject to the same rules in regard to non-combatants.[10] So far the function of aeroplanes in sea warfare has been much more limited than anticipated, owing to military reasons. What evidence there is, gives little ground for hoping that the suggested rules might establish themselves. Germany, at any rate, does not seem inclined to observe any more restraint in the conduct of air warfare than in

[8a] Similar vagueness makes the provisions on searching of neutral mails in Convention XI rather useless; cf. Smith, *loc cit.*, p. 12/13.

[9] Cf. Smith, *loc. cit.*, p. 52.

[10] Hague Committee, 1923, Spaight, *Air Power and War Rights*, Second Edition 1933; Smith, *British Year Book of International Law*, 1936, 37–44.

that of submarine warfare. The Allies have had no opportunity to use aircraft against German sea commerce. Again it might be pointed out that the suggested co-operation of airplanes with surface craft presupposes the existence of a substantial surface fleet with which they can co-operate.

One thing is certain: that the same factors which tend towards ruthlessness and lawlessness in the war on land and at sea, operate also in regard to the use of aircraft.

Reprisals

In the last war the appearance of a common law between the belligerents was preserved throughout, and that made it necessary on both sides to resort to reprisals in the drive towards lawlessness. In the present war the community of civilisation and law is at least doubtful. On the German side it is totalitarian in ideology as much as in the conduct of operations. Many utterances of Nazi leaders openly declare and indeed exalt the absence of common values with the arch-enemy. But the tendencies are conflicting, and the pseudo-legal notion of reprisal therefore still exercises its dubious function. It is characteristic of a society which has not overcome the stage of self-help, but pays lip service to the rule of law. Whenever a specific justification fails, reprisal is brought in as a sort of general clause of justification for acts which would otherwise be illegal.[11] The limitations expressed by the requisites of necessity and proportionality introduce an element of restraint; but as for necessity, it is as elastic here as is "military necessity" in Hague Conventions, and proportionality is difficult to measure when measures and counter measures have for their object the strangling of the life of a great nation.[12] Apart from that, here as in other matters, the parties are judges in their own cause. The

[11] Smith, *Guerre maritime*, p. 51.

[12] The stopping of exports of German origin, decreed by the Allies as a reprisal for Germany's unrestricted submarine and mine warfare, creates a difficult legal problem, in so far as it gravely affects the rights of neutrals. The justification put forward for this interference is similar to that put forward in the last war (cf. *The Stigstaad*, [1919] A.C. 279 and *The Leonora*, [1919] A.C. 974, that the interference is not graver and, indeed, less grave than that caused by the German measures which provoked them, and that neutrals, by suffering the latter, have committed a wrong which is being repaired by the reprisals. Cf. R. Y. Jennings, "Union," in *New Commonwealth Institute Digest*, No. I, January, 1940. On the basis of the existing law this argument is sound but it can be safely predicted that in every major war enemy exports will be stopped, and the action of reprisal covers a process of legal evolution.

Another argument is advanced by Professor H. A. Smith, *loc. cit.*, p. 25, who suggests that the rules of the Declaration of Paris are based on treaty and a fundamental violation by one party releases the other from its obligation. This argument seems to overlook, first, that the Declaration of Paris has developed into general customary law, and second that, in a multilateral treaty, the contractual relations between two parties cannot affect the position of third parties.

very elasticity of the notion of reprisal makes its use also desirable as a substitute for an ordered process of international legislation which would register fundamental changes in social conditions. Thus the interference with enemy exports to neutrals, not covered by any traditional definition of contraband, but plainly a principal and necessary weapon in economic warfare, can in terms of customary law only be justified in the name of reprisal. The whole conception of reprisal, like European society at present, stands on the borderline between a society which has not yet progressed to a real rule of law, but feels bound by a certain community of principles and interests, and complete lawlessness prevailing between warring factions not thus held together.

International Law shows us clearly that the respect for law may rest on three possible foundations—

1. Where it is firmly established, a law-giving authority establishes the law and the sanction for its enforcement. This stage International Law has not yet reached.

2. Where authority is absent, an equilibrium between conflicting interests, with roughly equal power, can support a law of less stability and strength but nevertheless real. This is the position of the customary law of neutrality.

3. Where either of the two aforementioned guarantees is absent, common observance based on community of cultural and moral standards alone protects habits to which many deny the force of law. This is the position of the laws of warfare, and the disintegration of these common standards has largely taken away their basis, badly shattered by the pressure of modern social conditions, and the development of totalitarian war in particular.

Law of Neutrality

The present threat to the law of neutrality therefore bites deeper into the structure of International Law than the eclipse of the rules of warfare. The existence of an equilibrium between conflicting interests has given reality to the law of neutrality for several hundred years. It is the disappearance of that equilibrium which has threatened the law of neutrality, in different ways, ever since the outbreak of the last war. The problem of neutrality shows more poignantly than any other branch of International Law the dependence of legal rules on the existence of certain political, social and economic conditions.

1. In a twofold way the law of neutrality is based on a balance of power.[13] A certain balance of power must exist in the relations

[13] Cf. Morgenthau, *Kansas City Law Review*, 1939, pp. 112 *et seq.*

between the belligerent groups themselves. as well as in the relations between the belligerents and the neutrals. In all major wars there is likely to be sufficient balance of power between the belligerent sides to make the possible addition of a neutral to the enemy side, through violation of his neutrality, a grave matter. But against that may be held the hope of a powerful belligerent to overwhelm a neutral before he can join the enemy or receive assistance, and thus to upset the balance of power in relation to the enemy. Against this threat neutral states have two defences: geographical isolation or military strength, which may be increased by collective neutral action.[14] Where all these factors are absent, in the opinion of one of the belligerents, neutrality is in danger, as was the case with Belgium and Greece in the last war, and is the case with practically all European neutral nations, except Italy and Spain, in the present war.

2. The condition of neutrality is gravely threatened where war assumes a predominantly economic character, unless both sides are essentially independent of economic relations with other countries not at war. Since war to-day must aim at the destruction of the enemy's economic resources, his sources of supply, production and consumption, it must tend to draw other countries in, unless the enemy is completely self-sufficient. No conceivable belligerent is, at present, in that position. The pre-eminence of economic warfare is a further inducement to risk the violation of neutrality.

3. The present law of neutrality, as laid down in the Declaration of Paris, the Hague Conventions, and the unratified Declaration of London, is directly dependent upon a specific division of the spheres of politics and economics, the former being a public and the latter being a private concern, the former within and the latter without the rights and duties of neutral states.[15] Now that distinction has become increasingly precarious, and indeed senseless, owing to social developments which make most of the law quite inapplicable.[16]

4. As the League Covenant attempted, although with reservations, to destroy the isolation of wars through a general duty to intervene in wars outlawed by the League Covenant, so the crusading character of the present war which is one of ideologies as much or perhaps more than of nations, will not, in the long run, tolerate neutrality. The missionary character which the

[14] Jessup and Deak, *Neutrality*, Vol. IV. Morgenthan, *loc cit.*

[15] Friedmann, *Fortnightly Review*, 1937, pp. 462 *et seq.*; *British Year Book of International Law*, 1938, pp. 118 *et seq.*; H. A. Smith, *Développement moderne des lois de la guerre maritime*, 1939.

[16] Cf. Friedmann and Smith, *loc. cit.*

totalitarian states attribute to their political system must consider impartiality, i.e. neutrality as anathema, and it does. But neutrality necessarily depends upon its respect by both sides.[17]

It is the combination of these factors, in the present war, which threatens neutrality in a way it has never been threatened before, except perhaps during the Napoleonic wars, when many of its essential features were not yet developed.

1. As between the belligerents, it is still a dangerous undertaking to violate neutrality and thus to add another enemy. But this consideration may well be overridden any day by the belief that the concentrated power of a modern *Blitzkrieg* launched by a major power may overwhelm a small adjoining neutral, before he has time to organise his defence and receive assistance, while, at the same time, permanent political threats are designed to prevent such neutrals from mobilising in time. Success of such an undertaking would, with one stroke, jeopardize the neutrality of every small neutral state in Europe. But of deeper significance is the change in the position of the United States, the chief protagonist of the law of neutrality as we know it, and largely responsible for its development during the nineteenth century. Neutrality was gravely threatened when the United States became a belligerent in the last war. The balance of power between neutrals and belligerents was then upset. This time the United States is again upsetting the balance, but not by participation. She has abandoned the active neutrality which forced belligerents to respect neutral rights, for a neutrality of abstention, or, rather, of taking no risks. However one may interpret the motives of the latest American neutrality legislation, whether as a strengthening of the tendency to make good business out of other peoples' war, a motive undoubtedly strongly present in the nineteenth century, or as a strengthening of the tendency to keep out of wars, even at the risk of sacrificing business, in one direction the tendency is clear: not to take risks for the defence of neutrality. This purpose both the withdrawal of American shipping from war zones and the "cash and carry" clause serve. If these clauses do not eliminate all risks of complication, as the recent notes protesting against the seizure of German goods destined for the United States, the deviation of American ships from permitted into prohibited zones and the search of American mail show, they do eliminate the chief causes and detach the United States from the defence of the law of neutrality, as developed during the nineteenth century. If the essence of that law was the protection of general international

[17] Friedmann, *Fortnightly Review*, 1940, pp. 24 *et seq.*

trade as a private interest, the United States has for herself abandoned this position, and with it the law of neutrality which is based on it. How far recent American legislation and political action substitutes for this discarded one a new conception of neutrality and international relations, will be discussed below.

2. The last war, with the gradual intensification of economic warfare, brought a series of successive restrictions of the sphere of neutral trade with belligerents. The extension of the notion of contraband, the application and extension of the doctrines of ultimate destination and continuous voyage, unrestricted submarine and mine warfare on the German side, and the long distance blockade coupled with the stopping of German exports, on the allied side, all reduced the position of neutral trade from one where trade was free in principle, subject to restrictions, to one where trade was intercepted in principle, subject to exemptions. Within a few months of the present war this position has been reached again, but a further intensification has taken place, owing to economic trends of the period between the wars. The German war preparation has economically been towards self-sufficiency within greater Germany and the surrounding countries from which it is impossible for any enemy to cut Germany off. On the other hand, Great Britain is more than ever dependent on oversea supplies and her sea trade. In these circumstances the countries which control the sea, but not the space surrounding Germany, must aim at maintaining open at least the ability of small neutral countries to carry on trade with both sides, in other words their ability to remain neutral, even within narrower limits. Their interests thus coincide with the defence of neutrality. Germany, on the other hand, in the case of most of these countries, will be and is inclined to regard the very maintenance of trade with both sides as a decisive strengthening of the enemy, which undoubtedly it is. Neutrality in all these cases[18] must be anathema to her. "He who is not with me is against me."

How far can the lawyer take these changes into account? Even the most conservative of lawyers must admit that the customary distinction between absolute, conditional and non-contraband is now valueless, let alone the artificial and dogmatic distinction attempted but never formally adopted of the Declaration of London. For certain very limited categories of pure luxury articles neutral trade will be tolerated. To do so may, to some extent, placate the neutral concerned, and it may actually do harm to an enemy who chooses to squander his foreign exchange on the

[18] For the difference in the position of the various neutral countries, *cf.* Friedmann, *Fortnightly Review*, Jan., 1940.

import of luxury articles, unsuitable for war purposes. There are not many such articles, and it is a matter of taste and temperament whether to maintain the traditional distinction in principle while recognising that in practice the huge majority of goods is now contraband,[19] or to acknowledge that the modern developments of state and society and warfare have abolished the distinction in principle. Here as in other matters the international lawyer may have to state the abandonment of former custom or the tacit repudiation of treaties without being able to detect, during a time of crisis, a new rule. With more confidence can he assert that the doctrines of ultimate voyage and destination have by now been so widely accepted, and over so long a period, that they may be considered as a general rule of law, and the same may be said of the new technique of proof of the contraband character of neutral goods. More important, however, than these single factors, which may well soon be obsolete, is the general tendency towards a reduction of the neutral sphere by the totalitarianism of modern war.

The lawyer can be more definite on the obsolescence of those customary rules of neutrality which presuppose a certain division of spheres between the state and the individual, such as Arts. 6 and 7 of Hague Convention XIII. Here the growing control of the state over economics has made old rules quite clearly inapplicable without there being, as yet, a new rule of equally universal validity. The present author may refer the reader to his former contributions on this subject[20] and to the illustration of this problem offered by the recent Russian note on the Allied blockade. In this note it was contended that Russian merchant ships were immune from search as state ships. The authors of the note may have overlooked that the argument is a two-edged one. If Russian state ships were to enjoy immunity from seizure, Russian trade with belligerents might have to cease, because, being state controlled, it is no longer an unpolitical commercial enterprise, like private business. Either way the argument is superficial. The deeper significance of the point brought out by the note is that the law of neutrality as it stands is based upon a homogeneity of social structure among the nations which is no longer existent. When any one or several states are either privileged or penalised because they have adopted a different social structure the law can no longer function between them and nations of different social structure. Now it is evident that state control over commerce is everywhere in the ascendant as it is clear that commerce and

[19] Thus Smith, *loc. cit.*, pp. 33–34.

[20] *British Year Book of International Law*, 1938, pp. 118 *et seq.* *Mod. L.R.* II, p. 194; *cf.* also Smith, *loc cit.*, 16 and 80 *sqq.*

trade have long ceased to be unpolitical pursuits and are, on the contrary, political weapons of the first magnitude. This operates strongly against the maintenance of neutral trade which is the backbone of the law of neutrality and it is characteristic that the only convinced defenders of that law to-day are those small states whose whole geographical, political and economic situation makes the maintenance of that status a matter of vital importance. A state like Italy is emphatic in stressing its "non-belligerency" as distinct from neutrality. It considers its present impartiality in the war (in so far as it exists) as a temporary expedient, not as a status. Lastly, like all law, the law of neutrality depends upon the existence of a certain moral code which, in its turn is the outcome of a common civilisation. This common civilisation is breaking up[21] and the struggle for the new shape of European life goes deep. No quarter is given while the struggle lasts, and a crusading spirit does not recognise neutrality, because it wants to dominate and, at the same time, impose its own way of life. The precarious balance of powers and interests which created the law of neutrality is thus upset from two opposite sides. Belligerents are driven by political, economic and ideological motives to violate neutrality where they feel strong enough to do so. On the other hand the greatest protagonist of neutrality, the United States, still protected by its geographical position as well as by its power, has given up the active protection of the rights of neutrality, hand in hand with a new outlook on international trade. In such circumstances it becomes more and more difficult to speak of one law of neutrality as binding all members of the family of nations. Instead the society of nations breaks up, for many if not for all purposes, into spheres and groups which may develop new law, and the strongest of these may eventually form the basis of a new general law. Even this, however, is far from being a foregone conclusion since there are many indications that groups of nations may replace the universal society of nations.

The Present Position of the League of Nations

The League has taken one of the most important decisions of its existence by the expulsion of Russia, a measure equalled in importance only by the sanctions decision against Italy. It was done by a concurrence of resolutions taken by the Assembly and the Council. The Covenant does not provide for any formal procedure to state a case of unlawful aggression (as a condition for the imposition of sanctions). When such aggression has taken

[21] Cf. Friedmann, *Modern Law Review*, Vol. II, p. 194; Schwarzenberger in *American Journal of International Law*, Vol. VIII, p. 56 *et seq.*

place, it is for every member to take his measures automatically. This theoretical position was, however, in fact revised, by a number of resolutions, notably the interpretative resolutions of 1921, which left the application of sanctions to the discretion of members and made the measures of individual members in effect dependent upon collective action[22]; they made a formal declaration of a state of aggression highly desirable. The resolution of the Assembly, taken unanimously, but with some abstentions, provided this formal statement as well as the basis for any specific action which the Council was to take under Art. 16. In the matter of sanctions, the Council did not go beyond a general recommendation to members to give assistance to Finland, but it decided upon expulsion of Russia under Art. 16, par. 4. The necessary unanimity was secured with the help of the rule of procedure—revised in 1933—that abstentions would not be counted as votes, and thus the expulsion of Russia is formally valid under the Covenant, while the extent of sanctions to be applied against Russia is left to the discretion of every member, in accordance with the *de facto* revision of Art. 16.[23] Nevertheless, it would be pure formalism to assert that the League Covenant has functioned in the originally provided way. It is possible for one of the paramount objects of the League Covenant, the maintenance of peace through collective security, to be fulfilled without complete universality, as long as membership or active co-operation comprises all those states whose enmity or aloofness might endanger this aim.[24] But it is impossible for this object to be fulfilled, when out of seven Great Powers five are either hostile or aloof. In such a situation, the League can only aim at fulfilling another task, perhaps equally important: to provide, in substitution for the alliance of power politics, a common policy of states based on certain principles of behaviour in international relations, and thus open to the adhesion of any like-minded power, but of no other. To form the nucleus of such a development, the recent resolution of the League was too indefinite, too isolated and too much embedded in the moves and counter-moves of the European conflict. It does, however, contain an element of great and salutary progress, compared with the position of hypocritical impotence to which the League had gradually sunk during the last few years: it acknowledges that a League confined to fewer states, united by similarity of purposes and conduct, is worth more than a universal

[22] The discretionary and collective character of sanctions was formally stated in a declaration by the British Government, before the Sixth Committee of the 1938 Assembly.

[23] Keeton and Schwarzenberger, *loc. cit.*, ch. IX.

[24] *Ibidem*, p. 107.

League which contains aggressors and attacked, active and passive members, which can survive only by abandoning the outlawing of aggression, the imposition of sanctions and altogether any common principles, and which reduces itself, as the League of the last few years did, to a meeting hall of a number of statesmen, who do not meet to make decisions but to communicate decisions made elsewhere.

Is it the purified rump League, from which one can expect a revival of the rule of law in international relations? Not, it is submitted, the League in anything like its present Constitution. For, owing to social and economic developments outlined above, and analysed in detail elsewhere,[25] international collaboration cannot be resumed again by a system of obligations between otherwise sovereign states which leaves homogeneity of political principles, social policy and economic relations aside, but only by a process of international integration, which starts with co-ordination of those essential spheres of social life and ends with a law to secure it. A law of peace, such as the League Covenant and the other peace instruments of recent years attempted, can be effective only in those exceptional periods when the universal reaction against the ruins left by a major war overshadows the looseness of social bonds or actual diversity of interests between the nations. A lasting law of peace, however, must and can only follow from the creation of a social community, as the whole of legal history shows. It is for that reason that the most significant development in the struggle for an international rule of law is not the recent League action, but the series of agreements which co-ordinate the military, political, economic, financial and social life of Great Britain and France. This is not the place to describe and analyse them in detail.[25a] But the mutual interdependence of common political purposes, military strategy, economic production, financial transactions, social policy is becoming more evident every day. When these developments have reached a degree of permanence, the inevitable outcome, more and more acknowledged even by statesmen who can hardly be suspected of excessive enthusiasm for international ideals, will be the subordination of national sovereignty to a common authority, and that permanence will find expression in law.[26] But the lawyer should never forget that the function of law is at the end of social developments, not at the beginning. The law gives form and permanence to social

[25] *British Year Book of International Law*, 1938, pp. 118 *et seq.*; *Modern Law Review*, Vol. II, p. 194; *New Commonwealth Quarterly*, June, 1939.

[25a] For an analysis see *New Commonwealth Quarterly*, March, 1940.

[26] Keeton, "National Sovereignty and International Order," Chap. IX. *New Commonwealth Quarterly*, June, 1939.

principles which have proved their vitality. When the process is reversed, as in the post-war experiments, the law breaks down, as it does, when it persists after the essential social basis has changed.

The significance of Anglo-French collaboration and integration lies in its potentialities. Taken by itself, it cannot secure peace or even a partial international order. But such a development in the relations between the two oldest and greatest national states of Europe is, of course, of wider significance, if it survives the immediate war purposes. And many changes, caused by the war, are likely to survive it.

Declaration of Panama

No less significant is the development marked by the Pan-American Declaration of Panama. First, the claim for a zone of three hundred miles from which belligerent activities are to be excluded, is openly revolutionary, just as the three mile limit and the prohibition of Prize Courts on American territory proclaimed by the United States Government in 1793 were an open challenge to the then governing principles of international law. The latter was successful and played a vital part in the making of the modern law of neutrality. The Monroe doctrine was a further challenge which has not so far been accepted as a rule of international law. The Declaration of Panama constitutes a further challenge to the freedom of the seas, as hitherto understood, and to the law of neutrality. There is, of course, no obligation to accept it. It can even be described as a breach of existing international law. As stated above, a major breach may constitute itself as new law, like every revolution, if it is successful, that is, if it comes to be so universally recognised as to make new custom. For some time to come, this question will remain unanswered, while it is likely that, for reasons of international tactics and distribution of power, the resolution will not be defied.

Beyond this negative aspect, the Declaration of Panama may constitute a further important step in the development of an American society of nations which surrounds itself by a protective wall and, behind that wall, develops a civilisation and a law of its own. This would contribute to the break up of the loosely knit universal family of nations into a number of closely knit families of nations, whose mutual relations are more or less loose. Such a development depends on many factors on which it is idle to speculate at the present moment.

W. Friedmann.

DESERTION AS A MATRIMONIAL OFFENCE

NOW that the Matrimonial Causes Act, 1937, has made desertion without cause a ground for divorce, a new interest attaches to old cases on the subject and already the Courts have been faced with numerous problems connected with the existence, continuance or termination of desertion. As a matrimonial offence desertion is entirely a creature of statute; after the Matrimonial Causes Act, 1857, it was a ground for judicial separation and until the Act of 1925 it was one of the grounds, if of two years' duration and coupled with adultery, on which a wife could obtain a divorce. No statutory definition of the offence exists and, though we have the high authority of Sir Henry Duke (as he then was) for suggesting that an exhaustive definition, wide enough to cover the infinite variety of matrimonial circumstance thrown up in the accidents of litigation, is impossible,[1] the essence of the offence is well known. The *locus classicus* is Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald*[2]: "No one can 'desert' who does not actively bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides quitting the matrimonial home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.'" Though it has recently been suggested[3] that passages in a later part of this judgment are too wide, the passage quoted above has been accepted as the basis of the law, and, as such, has been explained, amplified and commented on on many occasions.

Thus in *Frowd* v. *Frowd*[4] it was said: "Desertion means the cessation of cohabitation brought about by the act or fault of either party."

In *Jackson* v. *Jackson*[5] Sir Henry Duke said at page 23: "If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart that is desertion."

In *Sickert* v. *Sickert*, Gorell Barnes, J., said[6]: ". . . the party who intends bringing the cohabitation to an end and whose

[1] *Jackson* v. *Jackson*, [1924] P. at p. 24.
[2] (1864), L.R. 1 P. & D. at p. 698.
[3] E.g. *Pulford* v. *Pulford*, [1923], P. at p. 23; *Pardy* v. *Pardy*, [1939] 2 All E.R. at p. 362; *Shaw* v. *Shaw*, [1939] 2 All E.R. at p. 383.
[4] [1904] P. at p. 178.
[5] *Supra*.
[6] [1899] P. at p. 282.

conduct in reality causes its termination, commits the act of desertion."

This passage stresses the element of intention; and this, it is submitted, is really the crux of the matter, for as Hodson, J., has recently said: "Desertion is fundamentally, actual acts apart, a question of intention."[7] Now the Matrimonial Causes Act, 1937, section 2 (*b*), makes desertion without cause for a period of at least three years immediately preceding the presentation of the petition a ground for divorce; and it is submitted the element of intention, stressed in the above passages as essential for the existence of the offence, is the material factor to consider in deciding its continuance or termination, and also in questions of "cause." For the offence is desertion "without cause," and whether the respondent had cause or not must depend on his knowledge of the petitioner's conduct and on his mental reaction thereto; that is, on his intention as formed in all the circumstances. This view is borne out by the way in which the latter passage in Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald*[8] has recently been undermined; the learned judge said: "But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home has been resumed."[9]

In *Pulford* v. *Pulford*[10] the wife was for nearly twenty years an inmate of an asylum, during which time her husband commenced to live with another woman. On the wife's discharge in 1902 cohabitation was not resumed and it was not until 1922 that the wife took any steps against her husband. In that year she applied for a maintenance order on the ground of desertion, and the Divisional Court upheld the justices' order and put the desertion as commencing when the husband ceased to acknowledge her as his wife. The initial separation had not amounted to desertion and the change came when the husband's intention changed. These circumstances do not fit into Lord Penzance's dictum quoted above; yet the Divisional Court had no doubt that they amounted to desertion, which Lord Merrivale described as "not the withdrawal from a place, but from a state of things."[11]

This reasoning was followed in *Papadopoulos* v. *Papadopoulos*[12] where in 1914 the parties had separated under a deed of separation which in 1929 was held to be invalid, and the Court held that

[7] *Lynch* v. *Lynch*, [1939] 2 All E.R. 593.
[8] *Supra*.
[9] At p. 698.
[10] [1923] P. 18.
[11] *Ibid.*, at p. 21.
[12] [1936] P. 108.

it was open to the wife to plead desertion, notwithstanding that they had never lived together after the initial separation under the void agreement. So that, whatever the quality of the separation originally, it was changed into desertion as soon as the husband refused to cohabit in face of the wife's assertion of her rights.

Now it is well settled that the duty of cohabitation is suspended while proceedings are pending between the parties; and therefore the period during which a petition is on the file of the Court cannot be counted in calculating the period of desertion to satisfy the three years' duration required by the Act.[13] For the petitioner has by his own act required the other party to keep away. But where a petition was filed but not served it was held that desertion was not interrupted;[14] for the petitioner, not having put the suit effectively into process, had done no act requiring the respondent to stay away; conjugal obligations continued and the mere filing of a petition did not affect or alter the respondent's intention to stay away; and while that intention continues desertion continues. Again in *Lynch* v. *Lynch*[15] the wife filed a petition for nullity in 1924 but later gave intructions for it to be dismissed, and the parties lived together intermittently until 1933, when the husband refused to see the wife. On presenting a petition for desertion in 1938 it was found that the earlier one had remained on the file; yet Hodson, J., had no difficulty in deciding that desertion began with the husband's refusal in 1933; the mere presence on the file of the old petition was no bar, as it had not in any way affected the intention of the respondent.

Jordan v. *Jordan*[16] makes this line of reasoning abundantly clear. In 1932 the wife left the husband in circumstances that constituted desertion, and in 1934 he petitioned on the ground of adultery, but the petition was dismissed. After its dismissal no active steps to resume cohabitation were taken by either party, yet in 1938 the husband's petition for desertion succeeded, the President (Sir Boyd Merriman) holding that the earlier petition only suspended the desertion, which revived on its dismissal and continued as the respondent's intention to stay away had also continued.

Shaw v. *Shaw*[17] is on a different point, but illustrates, like the above cases, the way in which Lord Penzance's dictum has been eaten away. In that case the parties agreed before marriage not

[13] *Cohen* v. *Cohen* (1939), 55 T.L.R. 707.
[14] *Gibbs-Smith* v. *Gibbs-Smith*, [1939] 1 P. 170.
[15] *Supra.*
[16] [1939] 2 All E.R. 39.
[17] [1939] 2 All E.R. 381.

to cohabit and in fact never did; but it was held that the unreasonable refusal of the husband to begin cohabitation amounted to desertion. All these cases show, it is submitted, the test of the respondent's intention overriding the actual requirement of "resuming a common life and home."

Desertion is a continuing offence and therefore one has to look at the conduct of the parties, not only at the commencement of the desertion, but during its continuance. Here, again, it is submitted, that the continued existence of intention on the part of the guilty party to stay is the crucial element. Thus it is that a *bona fide* offer to return ends desertion: the intent has gone; *Thomas* v. *Thomas*.[18] Similarly, where a wife deserts her husband and is subsequently certified to be insane the desertion ends, for an insane person is presumed incapable of forming the requisite intention[19] unless the petitioner can prove that the insane party has in fact the requisite intention.[20] So, also, in cases of "constructive" desertion (where one party has by obnoxious conduct forced the other to quit the matrimonial home) the Courts have emphasised and stressed the element of intention that must accompany such conduct;[21] In *Bowron* v. *Bowron*, after an exhaustive review of the cases on "constructive" desertion, Pollock, M.R., said[22]: "The cases I have referred to . . . clearly indicate that a purpose and intention must be attached to the separation before desertion is proved." Lastly, where one party has deserted the other, such desertion will not be ended by occasional or intermittent visits without any intention to end the desertion and resume cohabitation.[23]

The view that in all instances where desertion is in issue the guilty party's intention is the material factor is, it is submitted, strikingly demonstrated by cases which deal with the circumstances in which a period of separation, initially amounting to desertion, may be deprived of that character. Thus a period of desertion can be ended by an agreement to live apart, and after such an agreement the separation loses its quality of desertion by reason of the change in the parties' intentions.[24] But where the separation agreement was not entered into *bona fide* by the party who, but for the agreement, would be guilty of desertion, the Court can and will go behind it[25] "and regard the real object

[18] [1924] P. 194.
[19] *Jones* v. *Newtown Guardians*, [1920] 3 K.B. 381.
[20] *Bennett* v. *Bennett*, [1939] 2 All E.R. 387.
[21] *Charter* v. *Charter* (1901), 84 L.T. 272.
[22] [1925] P. at p. 193.
[23] *Thurston* v. *Thurston* (1910), 26 T.L.R. 388.
[24] *Piper* v. *Piper*, [1902] P. at p. 202, *per* Gorell Barnes, J.
[25] *Crabb* v. *Crabb* (1868), L.R. 1 P. & D. 601.

that lay underneath."[26] By parity of reasoning it has been held where such a deed is repudiated by the guilty party the initial desertion will revive as the period of separation by mutual consent has ended with the repudiation of the instrument under which it originated.[27] *Watson* v. *Watson*[28] goes further than this but is explicable on the same reasoning. There was desertion and afterwards a "separation" agreement, but from the first the guilty husband failed to make the covenanted payments to the wife. Failure to make such payments does not of itself amount to repudiation[29] and thus revive the desertion. Yet Hodson, J., pronounced a decree on the ground that the separation deed was a "mere incident" in an already existing state of desertion. "The deed was a mere incident"; this can only mean that it did not affect or alter, one way or the other, the guilty party's intention to continue the desertion.

All these are instances where desertion has been found on the test of the guilty party's intention, even though the facts of none of them were within the passage quoted above from Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald*.[30] The Act, however, requires desertion "without cause,"[31] an expression which is not defined in the statute. The Courts have recently considered two different sets of circumstances in which "cause" for the desertion was raised as a bar to the petitioner.

In *Herod* v. *Herod*[32] the question was whether a petitioner, himself guilty of adultery, was precluded from petitioning on the ground of desertion. Section 4 (ii) of the Act makes the petitioner's adultery during the marriage a discretionary bar without distinguishing the grounds on which relief is sought. Thus on a literal reading of the statute it could be argued that as section 2 (*b*) made desertion a ground for dissolution and section 4 (ii) was in general terms, the offences of desertion and adultery were separate and distinct, and could exist independently of each other.

But it is arguable that the petitioner's adultery is "cause" for the respondent's desertion and the ground of relief is desertion "without cause," such adultery must therefore end the desertion as a matter of law. This view has prevailed in other jurisdictions,[33] where the law is substantially the same as in

[26] *Ibid.*, p. 604.
[27] *Roe* v. *Roe*, [1916] P. 163.
[28] [1938] P. 258.
[29] *Smith* v. *Smith*, [1915] P. at p. 289.
[30] *Supra.*
[31] Matrimonial Causes Act, 1937, s. 2 (*b*).
[32] [1939] P. 11.
[33] Scotland: *Mackenzie* v. *Mackenzie*, [1895] A.C. 384; Australia: *Gilbert* v. *Gilbert*, [1939] S.A.S.R. 79; New Zealand: *Douglas* v. *Douglas*, [1903] N.Z.L.R. 583.

England and in these countries the petitioner's adultery is an absolute bar to divorce for desertion.

In the old statutory jurisdiction a wife petitioner could obtain a decree on the ground of desertion for two years coupled with adultery; and there are in the books three cases,[34] in which decrees were granted to wives on these grounds, notwithstanding the fact of their own adultery. The argument in these cases turned on the propriety of the Court exercising its discretion in the petitioners' favour; the point that such adultery might as a matter of law terminate desertion was nowhere taken.

It is submitted that either on the strict construction of sections 2 (*b*) and 4 (ii) of the Act or the analogy of the above three cases ample grounds existed for deciding, as the Court did in fact decide, that the respondent's desertion was not *ipso facto* ended by the petitioner's adultery; and the latter was therefore only a discretionary bar. But that was not the way in which the Court dealt with the matter and in the way it was approached it became necessary to examine the nature and essence of desertion, and here the Court seized on the respondent's intention as the vital matter; for, as the learned judge (Merriman, P.) said: "It seems to me to be impossible to hold that adultery of which the deserter is proved to be entirely ignorant, or to which, if it is known, he or she is proved to be entirely indifferent, can have affected his or her intention."[35] This puts the matter clearly upon the ground of the adultery's effect on the respondent's intention and makes desertion depend, not on notional grounds (which the Courts have always avoided)[36] but purely and simply on the respondent's intention to go or stay away, if he has already gone. Where, in forming his design he is manifestly unconcerned with the party's conduct, that party's adultery is neither in law or in fact "cause" for desertion.

Herod's case has been approved and followed by the Court of Appeal in *Earnshaw* v. *Earnshaw*,[37] where the deserting party knew of the other party's adultery but was in no way influenced by it. The Court of Appeal held that mere knowledge was insufficient; it must be knowledge that sensibly affected the party's conduct. This again stresses the element of wilfulness or intention.

Pratt v. *Pratt*[38] is, it must be admitted, at sight first against the view contended for here, that in all questions of desertion the guilty party's intention is the paramount factor. There a

[34] *Symons* v. *Symons*, [1897], P. 197; *Hunter* v. *Hunter*, [1905] P. 217; *Hale* v. *Hale* (1915), 32 T.L.R. 53.
[35] *Herod* v. *Herod*, *supra*, at p. 23.
[36] Cf. *Jackson* v. *Jackson*, *supra*.
[37] [1939] 2 All E.R. 698.
[38] [1939] P. 117.

wife deserted her husband but later wrote requesting an interview; this the husband curtly refused and the Court of Appeal held that after this refusal she could not be said to desert him "without cause," as he owed "at least a duty to meet her and discuss matters."[39]

The judgment is brief and does not consider the authorities. Hitherto desertion could only be ended in such circumstances as these by a *bona fide* offer to return and the wife's letter by no stretch of the imagination amounted to that. The duties of the spouses are by now fairly clearly settled and "the duty at least to see the other party" is not among them. If either of these explanations be the true ground of the decision it surely goes beyond the authorities. May it not be that a sounder explanation of the case is that the letter indicated some wavering of the respondent's intention to continue the desertion, and the onus of proof is on the petitioner to prove the continuance of that intention, a fact that has been emphasised again and again.[40]

Desertion is, then, as Hodson, J., said in *Lynch* v. *Lynch*,[41] fundamentally a question of intention; and this, it is submitted, is the true test for judging all questions connected with its existence, continuance or termination. It is, as recent cases show, an elastic conception and one which cannot be confined within any precise formula, nor put on purely factual grounds. Easy to describe and difficult to define, desertion is nevertheless simply a question of fact; and in considering this, the reliable test is the test of intention, especially as in these cases the Courts are dealing with intimate relationships into which considerations of reason or logic are not likely to enter. In these circumstances the test must be a subjective one;[42] and that can only rest upon intention.

[39] *Ibid.*, at p. 179.
[40] See *Herod* v. *Herod*, *supra*, and *Jordan* v. *Jordan*, *supra*.
[41] Quoted above.
[42] Cf. *Herod* v. *Herod*, *supra*, at p. 16.

G. A. Forrest.

After the Court of Appeal's decision in *Williams* v. *Williams*[1] Langton, J., in *Rushbrook* v. *Rushbrook*[2] refused to follow *Bennett* v. *Bennett*[3] on the ground that insanity raises an irrebuttable presumption that the insane party is incapable of forming any *animus deserendi*; but Greene, M.R., in *Williams'* case hardly went as far as that: he said[4] . . . "in the case of a person of unsound mind . . . there is, *generally speaking*, no capacity to have the necessary *animus*." However, the Court of Appeal was surely right in holding that one cannot look at the insane party's acts while sane to draw an inference as to what his intention would have been, but for the supervening insanity. *Pratt* v. *Pratt* has been affirmed in the House of Lords,[5] but on the rather wider ground that the wife's conduct showed that during the statutory three years' she had not persisted in her *animus deserendi*.

[1] [1939] 3 All E.R. 825.
[2] 56 T.L.R. 17.
[3] *Supra*.
[4] At p. 828.
[5] [1939] A.C. 417.

EXCHANGE RESTRICTIONS IN ENGLAND

THE restrictions upon dealings in and transfers of gold, exchange and certain foreign securities which were introduced in consequence of the outbreak of war, constitute a measure unprecedented in the financial history of this country. Laws against the export of gold and silver, it is true, were on the statute book from the fourteenth century onwards, and the two fairly elaborate Acts of 1663 and 1696 were in force until at the end of the Bank Restriction Period complete freedom of trade in precious metals was restored or, rather, introduced to the modern system.[1] Even during the Great War, 1914–1918, the Government at first confined itself to preventing the export of gold only, and this it did by purely administrative measures which, after the end of the war, were put on a more secure basis by an Order in Council published in the *London Gazette* of 1st April, 1919, and, subsequently, by the Gold and Silver (Export Control, etc.) Act, 1920. As regards American and Canadian and some other securities, at the end of 1915 an appeal was issued to place them at the Government's disposal, and it was not before January, 1917, that the Treasury obtained power to purchase them compulsorily.[2]

In the present war the Government took more immediate and far-reaching steps. The first Order in Council, made in pursuance of s. 1, Emergency Powers (Defence) Act, 1939,[3] and containing the Defence (Finance) Regulations, 1939, in their original form, was dated the 25th August, 1939.[4] It was superseded by the Order of 3rd September,[5] and its present form is laid down in the Defence (Finance) Regulations Amendment (No. 2) Order[6] of 23rd November, 1939, as amended by the Order of the 20th December, 1939.[6a] Further Orders were made by the Treasury, particularly the Currency Restrictions Exemption Orders of which No. 4, dated the 20th December, 1939,[7] is now in force. It is to be regretted that this country seems to have followed the bad example set by so many foreign countries where the regulations were at first rather unsystematical and improvised and where it took years until consolidating regulations put so important a part of the law on a workable basis.

[1] See Mann, *The Legal Aspect of Money*, pp. 52, 53.
[2] See Feavearyear, *The Pound Sterling*, pp. 307, 308; S.R. & O. 1917, No. 47.
[3] 2 & 3 Geo. VI, Ch. 62.
[4] S.R. & O., 1939, No. 950.
[5] S.R. & O., 1939, No. 1067.
[6] S.R. & O., 1939, No. 1620.
[6a] S.R. & O., 1939, No. 1827.
[7] S.R. & O., 1939, No. 1843.

While in other countries the introduction of exchange restrictions was nearly always tantamount to a stoppage of payments necessitated by a smaller or higher degree of insolvency, the Defence (Finance) Regulations aim at the mobilisation of foreign investments and a protection of the sterling currency system. The latter point is clearly evidenced by the provision that, with the exception of securities dealt with in section 1, nothing is prohibited which is certified to be necessary for the purpose of performing a contract made before the 3rd September, 1939,[8] and by the fact that, generally speaking, transactions which concern the sterling currency only and are wholly carried out in this country, are hardly affected by the regulations.

Otherwise the Regulations follow well-known lines. Their enforcement is entrusted to the Treasury which have delegated their powers to the Bank of England. All transactions covered by the Regulations require the Treasury's consent without which they are illegal (see the language used throughout: "No person shall except with permission granted by or on behalf of the Treasury . . ."); and the cases decided in connexion with similar provisions would appear to warrant the following conclusions as to the effect of the regulations upon contracts. Contracts made before the 3rd September, 1939 which at that date were still executory, are discharged, if and in so far as the regulations make their performance impossible.[9] A contract made, without permission, subsequent to that date is as a general rule illegal and therefore void, it being immaterial that it might have been performed in a lawful manner if a permission had been given; the mere fact that no permission is in existence at the time when a contract is made renders it illegal.[10] And it seems that by virtue of this principle both the payment, transfer of securities, conveyance of property, etc., and the contract to pay, transfer, convey is avoided. If, however, both parties know of the regulations and are without any "wicked intention,"[11] an implied condition may be read into the contract to the effect that it is made subject to a permit being obtained, one of the parties undertaking to use his best endeavours to secure it.[12]

Contravention of the Regulations involves criminal liability,

[8] S. 3 (2) (*b*); s. 4 (1) (*a*) (ii); s. 5 (3) (*b*) (i).

[9] There is no subsequent impossibility, if a permission is obtained or if securities have to be delivered which have been duly registered and can, therefore, according to the practice established by the Authorities, be freely dealt in by residents.

[10] *In re Mahmoud and Ipahani*, [1921] 2 K.B. 716 (C.A.), particularly at pp. 725, 726 *per* Bankes, L.J.

[11] *Waugh* v. *Morris* (1873), 8 Q.B. 202.

[12] *In re Anglo-Russian Merchant Traders and John Batt & Co. (London)*, [1917] 2 K.B. 679 (C.A.), and see *Brandt & Co.* v. *Morris & Co., ibid.*, p. 784.

and the Treasury and their agents have wide powers to obtain information, inspect books, make searches, and so forth,[13] but they have also power to grant exemptions.[14]

As regards the details of the regulations, it is not intended to write a full commentary upon them. It must suffice to indicate their ambit in general and to mark a few salient features. Even on this somewhat narrow basis it will appear that, owing to the time-honoured British dislike of general clauses, the regulations leave many gaps. If the necessity should arise, they will, no doubt, be filled, but for the moment any lawyer who has some experience of similar measures adopted in foreign countries, will learn with satisfaction that, at present, Britain's financial state permits a certain largess. In the meantime it is perhaps not unreasonable to anticipate that certain words used in the Regulations will be construed by the Courts in their commercial rather than their technical sense; e.g. as regards the word "sell" the Courts may perhaps follow *Lambert* v. *Rowe*,[15] where it was held that the word "sell" in section 13 of the Markets and Fairs Clauses Act, 1847, was "not to be construed with reference to the niceties of the law of contract of sale or to the distinction between a sale and an agreement to sell or to the question whether the property in the goods has passed, but is to be understood in a popular sense,"[16] and that, consequently, there was a sale when and where an agreement to sell was made.

1. Section 1 relates to *securities* of any such class as may be specified in a Treasury Order, "being a class of securities which, in the opinion of the Treasury, is likely to be marketable outside the United Kingdom." The Treasury Order of the 26th August, 1939,[17] applies section 1 of the Regulations to securities in respect of which the principal interest or dividends are payable exclusively or, at the holder's election, optionally[18] in the currencies of Argentina, Belgium, Canada, France, Holland and the Dutch East Indies, Norway, Sweden, Switzerland, or the United States of America. A security includes shares, stock, bonds, notes, debentures, debenture stock, Treasury bills, a deposit receipt in respect of the deposit of securities, but does not include a bill of exchange.[19]

The holders of such securities are required to make a return to

[13] Ss. 3 (3), (5); 8; 9 applying Part V of the Defence Regulations, 1939.
[14] S. 4 (1) (*b*); s. 5 (3) (*c*); s. 5 A.
[15] [1914] 1 K.B. 38.
[16] At p. 44, *per* Ridley, J.
[17] *London Gazette*, No. 34659, 25th August, 1939.
[18] Securities which provide merely for an option of place are therefore not affected by the regulations. As to the distinction between option of place and option of payment see Mann, *loc. cit.*, pp. 147 *sqq*.
[19] Ss. 10, 1 (8).

the Bank of England[20]; the Treasury may transfer them to themselves "at a price . . . which, in the opinion of the Treasury, is not less than the market value," and where this is done the securities "shall forthwith vest in the Treasury free from any mortgage pledge or charge,"[21] there being elaborate provision as to the registration of the transfer, etc.[22] Moreover, a sale or transfer or any act "which involves the creation of a charge on," including a mortgage or pledge of securities belonging to the specified class requires the Treasury's permission.[23]

These restrictions do not apply "if the Treasury are satisfied that at all times since the beginning of the 26th August, 1939, all the persons interested in the security, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge or charge created before the said day, but including any persons beneficially interested therein under a trust, were not resident in the United Kingdom." It would seem, therefore, that every case where, owing to the beneficial owner not residing in this country, exemption is claimed, must be submitted to the Treasury or, in practice to the Bank of England to satisfy them that the securities are beneficially owned by a non-resident. This machinery, vesting unfettered discretion in the Treasury, will exclude many doubts and difficulties which would necessarily arise, if the individual had to decide for himself whether there is no person beneficially interested in the security resident in this country, but, on the other hand, it is bound to cause disappointment to many genuinely non-resident holders who will often be reluctant not only to specify their holdings, but also to disclose their identity to the authorities.

In many cases it will be difficult to decide whether a person is resident here or not, but the cases decided under the Income Tax Acts will afford a useful guide.[24] As at present drafted the regulations also apply to persons who have a residence not only in this country but also abroad. In many cases this will create a hardship which is perhaps not really intended. Moreover, the position of persons who cease to reside in this country is in no way subject to special provisions so that the regulations would appear to apply to them even after they have given up their residence here.

If it appears that any person beneficially interested in the securities resides here the duty of making a return rests upon the "owner," i.e. any person, "who has power to sell or transfer the

[20] S. 1 (1) (*b*).
[21] S. 1 (3) (*a*).
[22] S. 1 (3) (*b*), (4), (5).
[23] S. 1 (1) (*a*).
[24] See Farnsworth, *The Residence and Domicil of Corporations*, pp. 1 *sqq.*, 74 *sqq.*

security or who has the custody thereof or who receives, whether on his own behalf or on behalf of any other person, dividends or interest thereon or who has any other interest therein."[25]

Apart from the duty to register the securities and from the Treasury's power to obtain a transfer, the restrictions imposed upon the holder of relevant securities are confined to a prohibition to sell, transfer, charge, mortgage or pledge them[25a] or to transfer any security from a register in the United Kingdom to a register outside the United Kingdom[26] although a transfer to a register in any part of H.M. Dominions (excluding Canada, Newfoundland, and Hong Kong), any territory in respect of which the Government in the United Kingdom exercises a Mandate, any British Protectorate, Egypt, the Anglo-Egyptian Sudan and Iraq is allowed.[27]

It will be noticed that as at present drafted, the regulations prohibit only five specified transactions, namely to sell, transfer, charge, mortgage or pledge securities. Unless a very wide meaning is assigned to the word "sell,"[28] many transactions, such as the postponement of the date of maturity or the alteration of the currency are not prohibited.

2. As regards gold, i.e. gold coin and gold bullion,[29] and foreign currency, i.e. the currency of the United States of America, Canada, Belgium, Switzerland, France, Holland, Argentine, Sweden, and Norway,[30] practically identical provisions are laid down in sections 2, 3, 4, and 5. No person, whether resident or not, is allowed to take or send out of the United Kingdom gold or foreign currency[31] (which term in this connexion includes bills of exchange or promissory notes payable otherwise than in sterling,[32] unless they are payable in a currency "issued by the Government of or under the law of" any of the specified countries referred to above, "not being bills or notes which are legal tender in any of those countries"[33]). Only authorised dealers can, in the United Kingdom, buy or borrow gold or foreign exchange from or sell or lend the same to a person not being an authorised dealer.[34]

[25] S. 10.
[25a] S. 1 (1).
[26] S. 3 (1) (*aa*).
[27] Currency Restrictions Exemption (No. 4), Order 1939, S.R. & O., 1939, No. 1667, s. 1 (*b*).
[28] See above note 15.
[29] S. 10.
[30] See *London Gazette*, 4th September and 27th October, 1939.
[31] S. 3 (1) (*a*).
[32] S. 3 (6) (*a*).
[33] See note 27; Currency Restrictions Exemptions Order (No. 4), s. 1 (*a*).
[34] S. 2.

Every person resident in the United Kingdom who is or becomes entitled to sell or to procure the sale of any gold or foreign currency is bound to offer it for sale to the Treasury[35] unless the Treasury has been satisfied that no person beneficially interested in the gold or foreign exchange resided in this country on or after the 3rd September, 1939.[36]

Where this duty to offer exists, but is not complied with, the Treasury may direct that the gold or foreign currency shall vest in them; the effect of such a direction is that the gold or foreign currency for which a price to be determined by the Treasury must be paid, vests in them free from any mortgage, pledge or charge.[37] Where, however, the offer for sale has been duly made, no further obligations would appear to exist, and the Treasury, if they have omitted to accept the offer within a reasonable time so that, according to general principles of the law of contract, it has lapsed,[38] cannot even make a vesting direction; this would mean that, although a sale or loan can only be made by or to an authorised dealer,[39] other transactions, such as the creation of a mortgage, charge or pledge or a trust or an assignment are permissible.

A serious doubt seems to arise with regard to outstanding claims expressed in foreign currency. Section 5 (2) provides that every resident who is "entitled to assign or to procure the assignment of any right to receive outside the United Kingdom and the Isle of Man, in respect of *any credit or balance at a bank* payment of any amount in a foreign currency," must do all things necessary for the purpose of assigning that right to the Treasury. The regulations also provide that exporters must deliver to the proper officer such a declaration as the Commissioner of Customs and Excise may require "with a view to facilitating the enforcement of this regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which this regulation applies or not) by reason of the export of goods."[40] The word "credit" in section 5 (2), even if it does not envisage credits "at a bank" only, is obviously far from

[35] Ss. 4 (1), 5 (1).

[36] S. 4 (1) (*a*) (i); s. 5 (3) (*a*).

[37] Ss. 4 (1A), 5 (1A). s. 11 Currency and Bank Notes Act, 1928, which gave the Bank of England power to acquire gold held in excess of £10,000 at the old price of £3 17s. 9d. per ounce of standard gold is suspended by s. 4 (2). As *The Economist* of 2nd December, 1939, p. 339, says, "this bugbear of the gold hoarders thus disappears at the very moment when gold hoarding can no longer be indulged in."

[38] Following the dictum of Mellish, L.J., in *Dickinson* v. *Dodd* (1876), 2 Ch.D. 463, 475, it is generally assumed that an offer lapses by the offeror's death. If this doctrine is sound, which may be doubted, there is nothing which would prevent its application to the offer made under the regulations.

[39] S. 2.

[40] S. 5 (5).

comprising all outstanding claims in foreign currency which arise through the export of goods, the grant of licences or otherwise. Can it then be said that such claims are "foreign currency," i.e. any currency other than sterling[41] and that therefore, they are covered by sections 2, 5 (1), so that a sale or loan must be effected through an authorised dealer and a duty to offer is imposed upon whoever is "entitled to sell, or to procure the sale of, any foreign currency"? It may perhaps be argued that the term "foreign currency" as defined by the regulations is sufficiently wide to comprise claims expressed in foreign money and that the regulations attach at least the obligation to offer to the *right*, not to the ability to *procure* a sale. On the other hand, it must be remembered that currency primarily means ready money, that a claim expressed in foreign money may perhaps be validly discharged by the payment of sterling[42] so that no foreign currency ever becomes available and that with regard to a particular type of claims, namely credits or balances at a bank, it has been found necessary expressly to assimilate it to foreign "currency." It is therefore believed that outstanding claims expressed to be payable in "foreign currency" which are not "credits or balances at a bank" need in general not be offered.

However this may be, it is obvious that a creditor of such a debt retains many powers enabling him deeply to encroach upon the rights which, sooner or later, the Treasury can acquire. Subject to the provisions of section 3 (1) (*b*) dealt with below, he can assign it without selling it, he can request the debtor to pay to a third person for the creditor's account, he can release or compromise the debt or agree to the postponement of the date of maturity, etc.

3. In addition to the provisions already referred to and to the prohibition against taking or sending out of the United Kingdom bank notes which are legal tender in the United Kingdom, and postal orders,[43] section 3 (1) (*ab*) and (*b*) contains most elaborate and perhaps unnecessarily complicated provisions which cover transactions relating to both sterling and foreign currency. They read as follows—

> 3 (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury,
>
> (*ab*) draw, issue or negotiate any bill of exchange or

[41] S. 10.

[42] See *Anderson* v. *Equitable Assurance Society of the United States* (1926), 134, L.T. 557, 562 *per* Bankes, L.J., and the discussion in Mann, *loc. cit.*, pp. 245 *sqq.*

[43] S. 3 (1) (*a*); see s. 10. But there is no such prohibition in respect of bills of exchange or promissory notes expressed in sterling.

promissory note, transfer[44] any securities[45] or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred in favour of a person who is resident outside the United Kingdom and the Isle of Man, or make any payment to any such person;

(*b*) draw, issue or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred as consideration

(i) for receiving a payment, or acquiring property, outside the United Kingdom and the Isle of Man; or

(ii) for a right (whether actual or contingent) to receive a payment or acquire property, outside the United Kingdom and the Isle of Man;

or make any payment as such consideration.

But the Treasury have made far-reaching exemption orders. Sub-paragraphs (*ab*) and (*b*) do not apply if the person drawing, issuing, or negotiating the bill of exchange or promissory note, transferring the security, acknowledging the debt, or making the payment (hereinafter called the payor, promisor, or transferor) resides outside the United Kingdom or the specified area[46]. And if the payee, promisee, or transferee resides within the specified area, the operation of sub-paragraph (*ab*) is suspended.[47] Whether the parties are resident within or outside the specified area, sub-paragraph (*b*) does not apply if the payment is received or receivable or the property is situated within the specified area;[48] moreover, the payment of proceeds of the sale or redemption of or of dividends or interest on securities beneficially owned by a non-resident is not prevented by sub-paragraph (*ab*).[49]

It is submitted that the essence of these regulations may be conveniently summarised as follows—

No resident is allowed—

(1) to make a payment

(*a*) to a non-resident; or

[44] The expression includes transfer by way of loan or security: s. 3 (6) (*c*).
[45] The expression includes a deposit receipt: s. 3 (6) (*b*).
[46] Currency Restrictions Exemption (No 4), Order 1939, S.R. & O., 1939, No. 1843, s. 2. As to the countries forming the "specified area" see above, note 27.
[47] *Ibid.*, s. 1 (*c*).
[48] *Ibid.*, s. 1 (*a*).
[49] *Ibid.*, s. 3.

(*b*) to a resident as consideration for receiving a payment or acquiring property outside the specified area or for an actual or contingent right thereto;

(2) to draw issue or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt so that an actual or contingent right to receive a payment in the United Kingdom or in the Isle of Man is created or transferred

(*a*) in favour of a non-resident; or

(*b*) as consideration for receiving a payment or acquiring property outside the specified area or for an actual or contingent right thereto.

It may perhaps be useful to offer some comments on these provisions.

As regards *personal* qualifications, the terms resident and non-resident are employed to denote persons residing within and outside the specified area. If the payor, promisor or transferor is a non-resident the restrictions do not affect the transaction whether the other party is a resident or a non-resident and whatever its nature may be, i.e. whether he makes a payment, draws a cheque, transfers a security, etc., or whether the consideration is received or receivable or situate within or outside the specified area; provided, of course, that the regulations other than section 3 (1) (*ab*) and (*b*) do not apply. On the other hand, if the payor, promisor or transferor is a resident the legality of the transaction depends partly on its nature, partly on the residence of the other party to it; the payment to, and the creation or transfer of a right to receive a payment in favour of a non-resident, is not permitted, but even if the payee, promisee, or transferee is a resident, the contract made in consideration for the receipt of a payment or the acquisition of property outside the specified area is forbidden.

The privileges which thus appear to have been conferred upon the non-resident payor, promisor or transferor are perhaps rather wide, but, on the other hand, it may be doubted whether it is really necessary to restrict the opportunities of a resident so as to preclude him from many transactions with another resident which, very often, are not in conflict with the policy of protecting the nation's reserve of foreign exchange; that A in London who wants to buy for £1000 a Canadian patent belonging to B in Manchester, is prevented from paying the purchase price without permission, cannot be justified otherwise than by somewhat far-fetched arguments.

It is noteworthy that there is no machinery which, with regard to section 3 (1), (*ab*) and (*b*), would clarify the question whether a particular person is a resident or a non-resident. In many doubtful cases it will be necessary to obtain a ruling from the Bank of England, but the Courts are not bound by such ruling. A serious difficulty will arise in cases of agency. The resident agent of a non-resident principal probably shares the latter's restrictions as well as his privileges.

As regards the *nature or subject matter* of the transactions comprised by section 3 (1), (*ab*) and (*b*), it will be noticed at once that these regulations only deal with particular cases and therefore leave many others untouched.

1. Where the transaction consists in the making of a payment it is clear that it is illegal if the recipient is a non-resident. But even this apparently simple rule is full of complications. Can, e.g., a resident defendant who is being sued for a sum of money by a non-resident, plead that he is not allowed to pay? If not, are the Courts expected to order a resident defendant to pay money to a non-resident plaintiff, although they know that failing a permission from the Bank of England, the judgment cannot be enforced? If a payment is made "to" a resident, but in favour of a non-resident, there is no illegality; this enables A in London to pay to B in Birmingham in discharge of a debt of C in New York towards the latter. It may, of course, be that C is under a duty to indemnify A in New York, e.g. by making him a payment there, in which event section 3 (1) (*b*) would render the payment to B illegal; but if C undertakes to pay to A dollars in London[50] six months after the termination of the war, A's payment does not require permission. And if the consideration is neither a payment in New York nor the acquisition of property there nor a right thereto, but, say, the rendering of services in New York, the payment is also permitted, as the consideration is not of the type contemplated by the regulations.

2. Where the resident does not make a payment, but, by drawing, issuing or negotiating a bill of exchange or promissory note, transferring a security or acknowledging a debt,[51] creates or transfers a right to a payment in the United Kingdom or the Isle of Man, the position is different. If such a transaction is made in favour of a non-resident, it requires permission. The question under what circumstances the right is created or transferred "in

[50] If A resides in London the law even presumes this.

[51] There is neither here nor in any other connexion any prohibition of the assignment of a (sterling or foreign currency) debt. This omission may prove costly, particularly as an assignment often renders a set-off possible and thus may bring about a loss of valuable foreign exchange.

favour of" a non-resident, is a serious one. If it should be regarded as sufficient that, in a purely commercial sense, the transaction favours a non-resident, the provision would involve an immense encroachment upon commercial life, as there are innumerable transactions between residents which can be said to favour non-residents: the acknowledgment of a debt by resident A towards resident B, giving rise to a claim for a commission by a non-resident; the endorsement of a cheque by a resident in favour of a resident limited company which is exclusively controlled by a non-resident; the transfer of shares by a resident to the resident executor of an estate to which mainly non-residents are beneficially entitled—these and many similar transactions would require permission. It is difficult to believe that such was the legislator's intention. It is much more probable that all that was meant was to prevent a non-resident becoming the actual creditor or transferee. The provision would then merely mean that in the absence of permission a non-resident cannot be made the payee of a bill or note, the transferee of a security or the (original) creditor of a debt providing for payment in the United Kingdom.

The transactions envisaged by the regulations are, in general, of so definite a type that only few doubts can arise. It remains however, to be seen whether the term "transfer" of a security will not be given a wider meaning so as to include e.g. the creation of a trust, and it is also noteworthy that the Bank of England has intimated that a transfer of a security in favour of a non-resident will normally be permitted if the security is bought for the full current market price.[51a] Unfortunately it is impossible to give a final answer to the question what transactions are affected by the prohibition to acknowledge a debt. The term has repeatedly been considered in cases decided under the Statute of Limitations and in that connexion it found a liberal construction. If the same interpretation were adopted with regard to the exchange regulations the community would have to use great discretion in phrasing letters to non-resident creditors.

As regards the creation or transfer of a right to payment in the United Kingdom (as defined by the regulations) in consideration for the receipt of a payment or the acquisition of property outside the specified area, the requirements as to the situation of the corresponding performances considerably restrict the scope of the regulations inasmuch as the subsection is inapplicable, if both transactions are performed or performable within or outside the specified area.

[51a] See *The Times*, 5th January, 1940, p. 11.

Certain additional restrictions are made possible by the concluding sentence of section 3 (1) (*b*) which empowers the Treasury or their agents to "impose such restrictions on the making of payments and the doing of any other acts by *bankers* in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of sub-paragraphs (*ab*) and (*b*)." It in fact appears that certain instructions have been given to bankers; in particular, even before the Order of the 20th December, 1939, it had been laid down that no sterling could be paid to a foreign account at a bank in the United Kingdom unless permission had been obtained from the Treasury or their agents, completion of form E.1 being required for this purpose.

This short examination of the provisions of the Defence (Finance) Regulations thus warrants the conclusion not only that they give rise to many neat problems of law, only some of which could be touched upon here, but also that they do not affect a wide field of matters which in other countries were made the object of close control.[52] But in the course of Great Britain's financial history, the patriotic spirit of the people has indeed proved itself so forceful[53] that the Authorities are fully justified in relying on that irrational factor rather than on the artificial network of stringent regulations.

In conclusion, a few words on the international aspects of the regulations may perhaps be added. As the rights of non-residents are practically unaffected by the regulations and as the latter clearly indicate the policy of allowing the performance of existing commitments, no such repercussions will be experienced in foreign countries as, unfortunately, this country had to suffer from less considerate measures abroad. The fact that this country had to resort to exchange restrictions should therefore afford no justification for English Courts to treat such foreign regulations with still greater indulgence than they have done up till now. Any wishful thought that English Courts might be persuaded *a priori* to refuse any recognition whatsoever to foreign currency restrictions on the ground of a violation of English public policy, will, it is true, have to be abandoned; but already since 1935 there existed no foundation for such an expectation.[54] On the other hand, there is even now no reason to suggest that public policy cannot be

[52] On this point see also *The Economist*, 9th December, 1939, p. 378. As to amendments of the original Canadian Regulations see *ibid.*, 16th December, 1939, p. 416.

[53] See Mann, *loc. cit.*, pp. 73, 111.

[54] See *De Béeche* v. *South American Stores* (*Gath & Chaves*), *Ltd.*, [1935] A.C. 148, and *St. Pierre* v. *Same*, [1937] 3 All E.R. 349.

invoked in particular cases,[55] or that even without a recourse to that weapon established principles of law do not sometimes allow the rejection of pleas derived from foreign currency restrictions. There need not be inferred from the Defence (Finance) Regulations any attempt, for instance, to depart from the wholesome spirit animating the Court of Appeal's recent decision in *Kleinwort & Sons* v. *Ungarische Baumwoll Industrie A.G.*[56, 57]

[55] Some such cases are indicated by Mann l. c., pp. 265–268. It has recently been suggested (Cohn, L.Q.R. 55 (1939), 552) that if under a German contract an English debtor owes Reichsmark in Berlin, the German statute preventing the debtor from sending notes to Germany in discharge of his debt, is against public policy; apparently Cohn suggests that the case should be met by the same solution which he propounds in respect of the case in which the Reichsmarks are owed in Berlin under an English contract, i.e. that payment "is impossible as long as exchange control is in force and control authorities have not granted their permission to send in notes of their own country." In view of the fact that it would deprive the Custodian of Enemy Property of a good deal of receipts due to him under s. 1, Trading with the Enemy (Custodian) Order, 1939, this idea, however obvious its fallacy may be, still requires to be exposed. The debtor is under a duty to pay, not to send notes; directly or through the medium of an English bank, he could always procure the notes from a German bank which, on his behalf, would pay them to the creditor. Therefore there never existed an impossibility to pay in German legal tender. That Reichsmark notes could, in general, be paid if the place of payment was outside Germany, seems correct, although Cohn's apparent restriction of this rule to the case where the creditor resides in Germany, lacks justification. Incidentally, Cohn's criticism of *Pyrmont, Ltd.* v. *Schott*, [1939] A.C. 145, is equally unfounded; the decision is merely an illustration of the indubitable principle that if Spanish "pesetas" are owed, the agreement containing no clause as to a particular mode of payment, Spanish law determines which things are legal tender under Spanish law: see Mann *loc. cit.*, pp. 192 *sqq.* and the authorities there collected.

[56] [1939] 2 K.B. 678.

[57] Concluded on 6th January, 1940.

F. A. Mann.

Dr. EDWARD JENKS

The death of Dr. Edward Jenks removes a personality who had as wide an influence in the law during his generation as anyone of his contemporaries. In modern times the teacher has come to play as great a part as the judge, or an even greater part, for the judge's decisions are insensibly moulded by the teaching which he received as a student. Dr. Jenks was a great teacher who numbered among his personal pupils both in this country and Australia many who have achieved eminence in the law. By means of his writings, which were marked by an unusual lucidity and breadth of outlook, he reached and influenced a much wider legal public. The *Digest of English Civil Law*, for which he was in the main responsible, has been accepted on the Continent as the most authoritative exposition of English law. By building up a great school of law for articled clerks, as he did at the Law Society's School, of which he was Principal from 1903 to 1924, he ensured that one whole generation of solicitors should be leavened with sound legal scholarship. While by the Solicitors' Act, 1922, which was largely the result of his advocacy, he did his best to ensure that all future generations of solicitors should be educated to at least as high a standard. From 1924, when he might well have retired to a well-merited leisure he devoted six years to helping to build up the Law Faculty in the University of London, where he was the first occupant of the Chair in English Law, to a position of wide influence. Even in the ten years of actual retirement which followed Dr. Jenks continued to wield a prolific pen, and to prove that his mind had not lost its grasp or acuteness. His work did not lack critics, for he had pronounced views over a wide field of law, and held to his opinions with tenacity. But he was a great liberal and always looked forward to progressive developments. His support and commendation of The Modern Law Review has been one of our great encouragements. Finally must be mentioned his founding of the Society of Public Teachers of Law in 1909. Often referred to familiarly as Jenks' Trade Union, this body has undoubtedly done a great work in improving the standard of legal education in England, and has for many years been accepted by the Lord Chancellor's Department as the mouthpiece of the legal teaching profession.

Personally Dr. Jenks did not wear his great qualities on his sleeve, and his rather dry demeanour sometimes alienated people. He was, however, a man of real charm, and passed that great test of character, popularity and friendliness with little children. He was a loyal friend and colleague, and always had a warm welcome for old pupils and for those who had been associated with him in his many activities. This smaller group will mourn not only the passing of a man who in his time rendered great service to the community, but also the loss of a very human friend.

R. S. T. C.

STATUTES

Land Law and the Emergency Legislation

It is not perhaps surprising that with the exception of the Rent Restrictions Acts the emergency legislation of 1914–18 had no direct effect upon the growth of land law. War damage was insignificant and called for no specific change in the law. Requisitioning raised interesting points of constitutional law, but left untouched the general law of land. Very little of the legislation itself was directly concerned with land. The Courts (Emergency Powers) Act, 1914, besides containing the germs of the Rent Acts, merely created a moratorium in those cases where a tenant or mortgagee was unable to pay his debts because of the war, and when this excuse disappeared the Act itself disappeared. The Amendment Act of 1916 contained a useful clause, worthy of consideration to-day, enabling members of the armed forces to determine their leases. Another amendment act of the same year allowed the Court to suspend the operation of the Prescription Act when, by reason of circumstances attributable to the war, a servient owner was unable to build so as to prevent the acquisition of an easement of light. That was all.

From the point of view of land law, the major consequences of the war were not direct, but indirect. They emerged from the social upheavals of the war and post-war periods. Many of them have not yet reached maturity; many, we may be sure, have not yet appeared in the long robe of law. Housing and its problems have made the local authorities some of our biggest landlords, with the attendant but difficult duty of becoming model landlords; and, if legal evolution has any meaning, the standard which they set may well become the standard imposed by law on others. Slum clearance, overcrowding, town and country planning, each of them related to the essential problem of housing, have all emphasised, perhaps for the first time in English land law, the fact that property has duties as well as rights. All these things we owe to the acceleration of legal growth which was begun in 1914.

But they are all indirect consequences of that emergency. None of them, I think, could have been prophesied in 1914, and it would be rash to begin guessing in 1939. That the future emphasis will be on the duties, instead of the rights, of property, is an easy generalisation. Beyond it we step into the darkness of time. The new Rent Act, however, is surely a portent. The original Act of 1915 was purely an emergency measure, intended like all its successors to be temporary; yet its policy outlived the 1925 revolution in the law of real property, and to-day it is still with us, shorn of the obscurities of decontrol and enormously expanded in scope. Here, surely, is something which will outlive the present war. And it is a something of importance, not only to the practitioner but to the legal scientist, for it indicates unmistakeably that the law of landlord and tenant is changing rapidly from the sphere of contract to that of status. Other post-war Acts point the same way; the Housing Acts, the Landlord and Tenant Act of 1927, the Leasehold Property (Repairs) Act, the Agricultural Holdings Acts, all superimpose inescapable terms, all emphasise the status at the expense of the contract. But it was the Rent Acts which first made it possible, even inevitable, to recognise the change for what it is. Already in 1919, Parliament was driven to set out the terms of the new "statutory tenancy." To-day, those terms, varied only by the different

method of ascertaining the recoverable rent, are part and parcel of the vast majority of existing house tenancies.

This new status, it will be observed, is attached to the land, and not to the tenant. Here is no novelty, for away back in the Middle Ages the law of copyholds had already been transferred from the villein to the land which he held. The novelty lies rather in the number and cross-divisions of status—there is the agricultural holding, the working-class house, the controlled house; and one house may for various purposes come within two or more of these groups. The novelty lies also in the statutory source of the status. Copyhold land was governed by custom; it had some of the advantages of the modern principles of control, but, as the agricultural writers of the sixteenth and seventeenth centuries pointed out, the fetters of an unwieldy custom were too heavy, and slowly, as the result of their propaganda, the copyhold gave way to the leasehold. It seems that the wheel has now turned full circle. The contractual lease has played its part, and we are back again in a world of status. But the modern status is parliamentary, not customary; and as statute can change more easily than custom, so the new status is infinitely more flexible than the old.

Another service which the Rent Acts have performed, and will continue to perform, is to illuminate the important post-war developments towards security of tenure. Again other acts have played their part; at times directly, as when a new lease is the only protection for a tenant's goodwill; at times indirectly, when the landlord is faced with the alternative of granting a new lease or paying compensation either for disturbance or for improvements—what I have called elsewhere the "blackmail" principle of your money or your lease. Again it was the Rent Acts which because of their obvious relevancy showed that these other Acts, too, were governed by the same policy. Under the new Act, the very large extension of this policy to something like 95 per cent of the houses in the country has brought for the first time the advantages of security of tenure to the ordinary middle classes. Moreover, the working class house of to-day is not always the slum property of 1914, but something to which a new kind of "goodwill" can conceivably be attached. These are the two new factors which will dominate the future of the Rent Acts. It would be interesting, but idle, to speculate upon their effects.

The only real novelties in the new legislation are the result of the increased likelihood of war damage to property. So far, the government have followed the Weir Commission in postponing the answer to the ultimate problem of replacement and liability, and in consequence the present acts are stop-gap measures intended to avoid decisions rather than to make them. Emergency repairs to essential buildings and to houses which are needed to overcome an actual housing shortage are provided for by the Essential Buildings and Plant (Repairs of War Damage) Act and the Housing (Emergency Powers) Act. Of more general interest is the Landlord and Tenant (War Damage) Act, which now governs the relationship between the landlord and the tenant of property which suffers from war damage. Part I of the Act destroys all contractual or statutory duties to repair, including the landlord's covenant implied by Sect. 2 of the Housing Act, 1936. It applies only to "war damage" as defined by Sect. 24, but the necessary vagueness of the definition creates a real danger lest, after one air raid, every falling ceiling for miles around and for months afterwards should be caught by the Act; the power of the purse will no

doubt make full use of this suggestion as a means of getting round the ordinary Housing Act liability.

Part II seeks to overcome the common law rule of *Redmond* v. *Dainton*, under which the tenant's contractual liabilities remain despite the total destruction of the real subject-matter of the lease. The short effect of its complicated system of notices and counter-notices is this: when serious damage occurs, the rent ceases to be payable until the property is repaired; if the landlord is prepared to carry out the work, then the lease continues; if not, the tenant may either disclaim the lease or continue it at the price of doing the work himself. This part again applies only to "war damage" and only to war damage which makes the premises "unfit," a barbarity of referential terminology which requires a definition clause for intelligibility and a major war for excuse. Both have been provided. By Sect. 24, "unfit" means "unfit for the purposes for which those buildings . . . were used . . . immediately before the occurrence of the war damage in question." As far as house property is concerned, this sounds like an echo of the "unfit for human habitation" of the Housing Acts, the only difference being that for the purpose of war damage the Court must pay attention to the "standard of accommodation available at the material time, and to all other circumstances." Will the Courts apply to the new definition the comparatively high standard of fitness adopted for the purposes of the Housing Acts? It will not be an easy decision to make, for an unscrupulous landlord may find that these provisions work to his advantage. If a house is "unfit," he can compel the tenant either to accept the impossible burden of repair or to serve a notice disclaiming the lease. What, then, of the Rent Acts? Must such a tenant give up possession to a newcomer who is prepared to pay, not of course an additional rent, but its equivalent in the cost of repair? No doubt a tenant who has served or who is deemed to have served a notice of retention has a reasonable time to carry out the repairs, and may live rent-free the while; but will the Courts consider the tenant's ability to pay in determining what time is "reasonable"? The Act, indeed, gives the impression of hasty draftsmanship, and I look forward with interest to its interpretation and amendment.

Part I of this Act applies to all obligations to repair under any "disposition," and it no doubt affects the usual repairing covenants in a mortgage. A mortgagee is thus placed in suspense with regard to his security in the same way as an owner with regard to his property. The Courts (Emergency Powers) Act and, of course, the Rent Act, also apply to mortgages. Generally speaking, they follow the precedents set up in the last war, and as no doubt they will disappear like their predecessors when the present emergency ends, I do not intend to discuss them. On the other hand, the Possession of Mortgaged Land (Emergency Provisions) Act is new, and introduces a principle which deserves a better fate than its fellows. The mortgagee's normal right to take possession of the mortgaged property is not the result of an express bargain, nor, save perhaps in the case of the charge by way of legal mortgage, is it given by statute. It is the effect of the legal estate, formerly the fee simple, now a long term of years, which by an historical accident is traditionally vested in the mortgagee by the mortgage itself, and in consequence the right arises at once. Of course, few mortgagees exercise the right unless their security is in actual danger, and, when it comes to taking accounts, equity carefully distinguishes between the mortgagee who properly takes possession and his less forbearing fellow. But now that the legislation of 1925 has brought

us within sight of a rational system of mortgages, and has given us a practical demonstration that a mortgagee does not really require the fiction of a legal estate, there seems to be no reason why we should not extend the equitable distinction, and refuse possession to a mortgagee unless either the security or the payment of the debt is in danger. The only sufferers will be the rogue and the novelist. And now the first step has been taken by the Possession of Mortgaged Land (Emergency Provisions) Act. For reasons which are no doubt capable of explanation, if not of justification, it applies only to mortgages existing at the outbreak of war. But a *prima facie* case has been made out, and it is now up to the "other side," whoever they may be, to show cause why the rule should not be made both absolute and permanent.

A. D. Hargreaves.

Trading with the Enemy

The Trading with the Enemy Act, 1939, takes the place of a large number of statutes passed, and proclamations made, in the last war. The approach to the problem of preventing trading with the enemy was different in 1914 from what it is to-day. The implications of economic warfare had not been grasped in full, and the first enactments and proclamations made in 1914 look timid and tentative if compared with the wide and drastic powers conferred upon the executive during the later stages of the war. While this fact explains the extraordinarily complicated and partly confused character of the Trading with the Enemy legislation of the last war, there can be no doubt that the new Act also reflects the considerable progress made in general legislative technique since 1914.

The Trading with the Enemy Proclamation No. 2 of September 9, 1914, contained a laborious enumeration of the various Acts and transactions constituting "trading with the enemy." It had to be read in conjunction with an earlier Proclamation of August 5, 1914, concerning Government loans raised by the enemy, and contracts and dealings with the German Government itself, and, in one important respect (insurance) it had to be amended less than a month after its publication (Proclamation of October 8, 1914). This time it has been found possible to sum up the matter by an elastic though sweeping formula. Trading with the enemy is defined as "commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy." The words "for the benefit of" should be noted. A transaction calculated to be beneficial to an enemy is penalized although no enemy may be a party to it. A contract between two persons resident in Britain or between a person resident in this country and the inhabitant of an allied or neutral country may come under the definition, and the same is true of payments made in this country and in allied or neutral territory. The encashment of a coupon on behalf of a neutral "man of straw" is an instance, but not all examples are so obvious. Any less comprehensive definition would have failed to meet the devious measures used by Germany to counteract the effects of the financial and economic blockade. Three examples (partly overlapping) are given, but they are "without prejudice to the generality" of the definition. They concern a variety of commercial transactions calculated to assist the enemy's economic system. But not all of them could, in ordinary language, be described as trading *with* the enemy. Thus, the Act prohibits dealings in goods calculated to benefit the enemy. It is forbidden not only to supply

goods to or obtain goods from an enemy, but a shipment of goods to a neutral which may be "for the benefit of an enemy" is covered by the prohibition, and a person subject to the criminal jurisdiction of the English Courts is precluded from trading in or carrying "any goods consigned to or from an enemy, or destined for, or coming from enemy territory." This latter clause shows how the ancient common law conception of "trading with the enemy" has proved useful in being put to the services of the modern long distance blockade. The stamp of enemy character is impressed on all goods travelling to and from enemy ports, and all dealings in such goods, for example, their carriage and presumably their insurance has been made a criminal offence, although no enemy is involved in the actual transaction.

Payments and transmissions of money, negotiable instruments and "securities for money" (*a*) to an enemy, (*b*) for the benefit of an enemy, and (*c*) to a place in enemy territory, are the second example given to illustrate the general definition, and a third clause prohibits not only the performance of an obligation to, but also the discharge of an obligation of, an enemy. Again the term "trading with the enemy" is quite inadequate to describe the far-reaching effect of these prohibitions.

A new provision (section 6) includes the purchasing of enemy currency (coins and notes) in the definition of the offence.

The greatest interest attaches, of course, to the definition of the term "enemy." Again the draftsmen were in a position to profit from the painful experiences made by their predecessors a generation ago. Step by step the scope of the proclamations and statutes of the last war had to be enlarged so as to include an increasing number of persons and "bodies of persons" in order to give effect to the legal requirements of economic warfare. It would be tedious and useless to go through the whole of this development[1]), but it should be remembered that the Proclamation of September 9, 1914, went no further than including persons and bodies of persons "resident or carrying on business in the enemy country," and "in the case of incorporated bodies, enemy character" attached "only to those incorporated in an enemy country." It was only by the Trading with the Enemy (Extension of Powers) Act, 1915, passed in the last days of that year, that effective steps were taken to prevent dealings with persons and bodies of persons of "enemy nationality or enemy association" in neutral and allied territory. Further difficulties arose from the fact that persons residing or carrying on business in enemy occupied territory were not included in the original definition (while this time "enemy territory" has been so defined as to include areas occupied by the enemy). It was by the Courts and not by Parliament or the Executive that the test of "enemy control" was introduced in order to determine the enemy character of incorporated bodies.

The definition of an "enemy" in section 2 of the new Act must, first of all, be read in conjunction with section 1 (3) by which "any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy." A person may, therefore, be an "enemy" for the purposes of a given transaction though not permanently stigmatized as an "enemy" under section 2. That section itself embodies, in regard to individuals, the common law test of residence in enemy territory, though, surprisingly, not that of "carrying on business," so that a

[1] For a survey of the development, see Scobell Armstrong, *War and Treaty Legislation*, 1914–1922, 2nd Ed., p. 114.

person resident in neutral territory and carrying on business in Germany is not, by this fact alone, an enemy. As regards bodies of persons (corporate or unincorporate) the Act combines the traditional common law test of "incorporation or constitution" (used, for example, in English and American Private International Law) with the control principle evolved in the last war. If a body of persons is controlled by an enemy (who, of course, may himself be a "body of persons") it is an enemy, wherever it is incorporated and wherever it may have its seat or centre of management and wherever it carries on its business. On the other hand, a partnership constituted under German law and a company incorporated in Germany are, by these facts alone, enemies, though they may otherwise have severed all connections with Germany. The test of "carrying on business in enemy territory" has been rejected and so has the Continental view that a corporation derives its nationality not from its incorporation, but from its seat whether this term be construed as implying the *siège social* or the *centre d'exploitation*. A company incorporated in neutral territory and controlled by an individual resident there is not an enemy though it may have its main business activities in Germany. This is, however, innocuous, in view of the wide concept of "trading with the enemy" described above, comprising as it does trading in goods destined for enemy territory and transmission of money to a place in enemy territory.

Moreover, section 2 (2) embodies the principal effect of the Trading with the Enemy (Extension of Powers) Act, 1915, by empowering the Board of Trade to specify persons who shall be deemed to be enemies. Thus, all gaps left by the statutory definition can be closed by executive orders.

The vital distinction between "enemies" and "enemy subjects," already familiar to the legislation of the last war, is again embodied in the Act. An enemy subject is a citizen of an enemy country (not being a British subject), wherever he is resident. In regard to "bodies of persons" the test is "constitution or incorporation" so that every body of persons which is an enemy subject is also an enemy, while as a consequence of the control principle, it may be an enemy without being an enemy subject.

Very wide powers are vested in the Board of Trade to secure the enforcement of the Act. In this respect again the matter was taken up where it had been left at the end of the last war. These powers comprise the inspection of books and documents, the obtaining of information, the entering of premises, and, in the last resort, the appointment of "a supervisor" in order to gain complete control of firms suspected of contravening the Act (section 3).

Other provisions strike at the validity of assignments of choses in action, transfers of negotiable instruments (including coupons and other securities transferable by delivery) made by or on behalf of an enemy, and at transfers of securities (annuities, stock, shares, bonds, debentures or debenture stock) registered in the United Kingdom. In so far as the latter are issued by a company within the Companies Act, 1929, they can no longer be transferred or allotted to an enemy subject without the consent of the Board of Trade. The latter provision would not seem to extend to statutory companies, nor does it apply to bearer securities issued by companies registered under the Companies Act.

In 1914 the desire to prevent payments to enemies inaugurated the first provisions (made under the Trading with the Enemy Amendment Act) by which enemy property in this country was subject to special measures. Their object, however, was also to preserve, "with a view to

arrangements to be made" at the conclusion of peace, "money and certain other property belonging to enemies." Strictly speaking, the latter purpose is outside the purview of "preventing trading with the enemy," but the corresponding measures are again contained in the Trading with the Enemy Act. Section 7 of the Act in conjunction with the Trading with the Enemy (Custodian) Order, 1939, provides that money, otherwise payable to or for the benefit of an enemy, is payable to a custodian (in England the Public Trustee). Property, belonging to an enemy or to an enemy subject can be vested in the custodian by a "Vesting Order" made by the Board of Trade, which has the effect of a Vesting Order made by the High Court under the Trustee Act, 1925.

A large number of questions of detail are bound to arise in the course of the application of the Act, many of which will be governed by the wealth of case law surrounding the legislation of the last war. Some questions suggest themselves even now. One of them concerns the relation between the Act and the common law rule which vitiates contracts involving trading with the enemy. This principle is not expressly embodied in the statute which contains mainly penal sanctions. It will be interesting to see whether the statutory definitions of "trading with the enemy" and of "enemy" will be extended to the application of the common law principle. It may be submitted that, irrespective of the common law rule, every contract in violation of the statute might be held to be illegal on the ground that it contravenes a statutory prohibition. If this view prevails, the common law rule has been superseded for all practical purposes.

The Transfer and Control of Ships and Aeroplanes

There is not a great deal to be said on this subject. As regards ships, action had already been taken before the commencement of the war. The purchase of British merchant vessels for transfer to the German flag which was taking place with some frequency in the earlier part of 1939 began to attract public attention, and as war with Germany became more and more probable strong criticism was directed at the Government for not taking steps to prevent it. The subsequent war on merchant vessels shows that the public instinct has once more been sounder than the judgment of the responsible authorities who were finally forced to take action, and procure the passing of the Ships and Aircraft (Transfer Restrictions) Act, 1939, under which it became unlawful to transfer British ships registered at British ports to a foreign register or indeed to make any transfer or mortgage without the permission of the Board of Trade. With the establishment of the new Ministry of Shipping the like power to issue licences permitting such transfer was conferred upon that department. The penalty for transgression is forfeiture.

The occasion of the passing of the statute was taken to provide for the possibility of similar restrictions upon the transfer of aeroplanes. An order was later issued under the Act putting this restriction into operation and making the sale, transfer or letting on hire of any aircraft unlawful without a permit from the Secretary of State for Air (S.R. & O., 1939, No. 1015). A later order (No. 1587) requires the owner of every aircraft within Great Britain to register his property, and to notify every transfer to the Air Ministry.

It may perhaps be noticed here that very drastic restrictions have been placed upon private and commercial air navigation. For example, no one

can fly an aeroplane without a licence. Further, the east coast of Great Britain, being that which faces the enemy and is most liable to attack, has been placed so to speak, out of bounds, and no aeroplanes are allowed to fly there unless belonging to the R.A.F. or licensed by the Ministry. This rule does not apply north of Perth. Even so, there is clearly some danger of enemy 'planes crossing one of the less vulnerable coast lines, and this has been got over by the establishment of narrow corridors along which incoming aeroplanes must fly and where they can be subjected to scrutiny. These are seven in number, and the only one on the east coast is to the north-east of Scotland where the Scandinavian route by Stavanger runs. It is further equally necessary that those in charge of planes should observe various conditions as regards markings, etc., which facilitate observation and control by the authorities. The details of these are set out in S.R. & O., 1939, No. 1016. In fact this and Order No. 992 are worthy of perusal for a more detailed idea of the present position as regards the flying of aircraft.

It may be recalled that in 1938 a licensing system for commercial air transport, whether of goods or passengers, had been established under an order of that year (Licensing of Public Transport Order, 1938). This has been revoked, but the various licences issued under it were not cancelled (S.R. & O., 1939, No. 1588).

It is perhaps hardly necessary to add that another Order (No. 1014) gives to the executive power to requisition aerodromes, and aircraft, plant, and machinery found at such aerodromes. It is curious that the framers of this order were so unusually modest in their requirements.

We may observe that shipping has been subjected to a control only less complete. The Admiralty has naturally become the authority as regards navigational directions, and a series of orders deals with such matters as darkening ships (S.R. & O., 1939, No. 1155), lights (No. 1156), routes (No. 1157), the use of wireless telegraphy (No. 1158), and pilotage (No. 1162). The Shipping Department of the Board of Trade had important duties conferred upon it which are now apparently shared with and in practice exercised by the Ministry of Shipping. Here the principal problems are (*a*) making the most economical use of the available tonnage, and (*b*) the securing of the most advantageous priorities in connection with such matters as shipbuilding and repairs. These matters are dealt with in S.R. & O., 1939, No. 1090, under which no British ship is to proceed to sea without a licence, and Nos. 1086 and 1087, under which licences are required for ship repairs or for ship construction. No. 1065 may also be referred to. It introduces a scheme of compensation for seamen whose effects have been destroyed or damaged by operations of war.

R. S. T. C.

Official Secrets Act, 1939

The Sandys Case and the various other incidents during 1937–9 which have been referred to from time to time in this review resulted in a modification of the Official Secrets Act, 1920, which has a certain importance, for it reduces to some extent the much criticised powers of any police officer not below the rank of an inspector to require any person to disclose any information in his power relating to an offence or suspected offence under the statute. It was under this section (section 6) that Mr. Sandys, M.P., was threatened by the Attorney-General. By section 1 of the Amending

Act recently passed (2 & 3 Geo. VI, c. 121) the permission of a Secretary of State to such interrogation must first be obtained, unless in a very urgent case where a chief officer of police may exercise his discretion to interrogate at once, but must report his action to a Secretary of State forthwith. It will be observed that even in this case the discretion is entrusted only to a chief officer of police, which means an officer of the rank of chief constable.

It may be noted that while section 6 of the Act of 1920 also conferred the power of interrogation upon a member of His Majesty's forces engaged on guard, sentry, patrol, or similar duty, the new section does not extend to such categories. There is no evidence that section 6 was ever used by soldiers, but the power is obviously a dangerous one, and much more likely to be exercised during time of war than peace, so this amendment is also significant. It must be added, however, that Regulation 80A of the Defence Regulations confers ill-defined but apparently wider powers of interrogation upon persons acting on behalf of a Secretary of State or the Admiralty whenever such person "considers it necessary or expedient in the interests of public safety." During the period of the war, therefore, the executive has taken back with both hands what under Parliamentary pressure it yielded with one.

R. S. T. C.

NOTES OF CASES

Principle of Precedent

Nelson v. *Cookson*, [1940] 1 K.B. 100, is a decision which deserves notice for two reasons. The defendants, who were medical officers at a county council hospital, were sued for negligent performance of an operation and pleaded the Public Authorities Protection Act. It was argued for the plaintiff that since they were not servants of the hospital authority so as to bring the doctrine of *respondeat superior* into play (*Hillyer* v. *Governors of St. Bartholemew's Hospital*, [1909] 2 K.B. 820), they must be independent contractors who are unable to claim the benefit of the Act (*Tilling, Ltd.* v. *Dick Kerr & Co.*, [1905] 1 K.B. 562). Atkinson, J., thought this an interesting argument to which he might have been disposed to attach some weight had it not been for two previous decisions to the contrary by which he thought himself bound. It is clear from the judgment of the majority of the Court of Appeal in *Wardell* v. *Kent C.C.*, [1938] 2 K.B. 768, that the common law classification into servants and independent contractors is not necessarily exhaustive where the interpretation of a statute is concerned, and we respectfully agree with the learned judge who is reported in [1939] 4 All E.R. 30, at p. 34, as saying: "It seems to me really almost an absurdity to ask me to regard the defendants as independent contractors. They are not; they are officers of a public body performing a public duty imposed upon the county council, a duty which can only be performed through and by individuals."

The second, and more interesting, point concerns the nature of the authority by which the learned judge held himself bound. In two previous cases, one a decision of the Court of Appeal and the other a considered judgment of McCardie, J., it had been conceded by the plaintiff and assumed by the Court without argument that medical officers in the position of the defendants were within the protection of the statute. Whether these cases created precedents which had to be followed in the instant case is a matter on which there is little authority. The older view is summed up in *Viner's Abridgment, tit.* Precedents (A) 2, in which it is said that "precedents which pass without challenge of the party or debate of the Justices are not regarded as law." This statement was modified or explained by Parker, C.J., in *Reg.* v. *Bewdley* (1712), 1 P.Wms., at p. 223, where he remarked: "It is a rule, indeed, that precedents *sub silentio* are of little or no authority: but that is to be understood of cases where there are judicial precedents to the contrary." The Chief Justice is here limiting the application of the maxim to situations which arise not infrequently when a court assumes a point of law in ignorance of the fact that it has previously been decided the other way after argument. A modern example of this can be found in *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364, in which McCardie, J., refused to follow a line of decisions based on the assumption that a police officer is the servant of the corporation which engages and pays him, in which older authorities to the contrary were not discussed or even cited. But the question in the instant case concerned the importance to be attached to an assumption about the interpretation of a statute when no conflicting judicial view had been expressed. Such an assumption must be of a persuasive and not a binding nature, and its weight must vary with its reasonableness and the length of time during which it has passed unchallenged. If the assumption is obviously wrong,

as was the case in *Cookney* v. *Anderson* (1863), 1 De G. J. & S. 365, where Lord Westbury assumed that the statutory provisions governing the issue before him were contained in Acts of 1830 and 1832, in ignorance of the fact that those Acts had been amended in 1840, the assumption will not be followed, even by an inferior court (*Drummond* v. *Drummond* (1866), L.R. 2 Eq. 335, *affirmed* L.R. 2 Ch. App. 32). If it is not obviously wrong, a judge is free to accept or disregard it, and the decision will depend on whether satisfactory arguments can be adduced *ex post facto* in its support. But if it has stood unquestioned for some years, a judge will be loath to overrule it even if he personally thinks it wrong, and his attitude will gradually harden into one of unqualified acceptance if there continues to be no challenge. The situation is exactly comparable to that which arises when a superior court is faced with a point on which there is a consistent line of authority in the lower courts (*Bourne* v. *Kean*, [1919] A.C. 815: *Re Carrington*, [1932] 1 Ch. 1). This was the view taken by Atkinson, J., in the present case, for he said ([1939] 4 All E.R., at p. 33): "I quite agree that the matter has not been argued and made the point of a decision. It is still open to be dealt with, but when one finds that for quite a long time a certain rule has been accepted as law, it would take a great deal to convince one that it was wrong." The opening words of this quotation down to "open to be dealt with" do not appear in the *Law Reports* or in the version in 56 T.L.R. 2, but this omission affects the clarity and not the force of the argument.

From the nature of the case, any challenge to prevent time running in favour of the assumption cannot come from the Bench, for then there would be a conflict of judicial opinion, and the remarks of Parker, C.J., quoted above, would apply. Acceptance or non-acceptance, therefore, could be proved only by reference to the opinion of the profession as reflected in textbooks and articles. Some confirmation of the attitude of Atkinson, J., can be found in *A.-G.* v. *Hancock*, [1940] 1 All E.R. 32, where Wrottesley, J., in deciding that the Courts Emergency Powers Act, 1939, did not bind the Crown, thought it "not unimportant and not entirely irrelevant" that an Irish Court had assumed that the similar statute passed in 1914 did not apply to the Crown and that no person had previously come forward "either in respect of the Courts Emergency Powers Act, 1914, during its pendency, or under the present Act," to maintain the contrary. The less forceful language used by the latter judge can be explained on two grounds, firstly, that Irish decisions are of persuasive authority only in this country, and secondly, that the assumption relied on concerned a statute other than the one before him, though the material parts of both were couched in almost identical language.

D. W. Logan.

Corporate Entity

The perennial problem, whether and in what circumstances the veil of corporate entity can be lifted appeared in a somewhat unusual setting in *Smith, Stone and Knight, Ltd.* v. *Birmingham Corporation*, [1939] 4 All E.R. 116.

The tendency rigidly to uphold the strict separation between the assets and liabilities of the corporate person and those of the incorporators prevails in company law proper and in private law in general. A more "realistic" attitude has sometimes been adopted in revenue law. The case

under review is remarkable for an application of principles developed in revenue law to the allocation of assets between a subsidiary and a parent company.

A parent company which was a paper manufacturer owned or controlled all the share capital of a subsidiary company carrying on the business of waste paper merchants, the directors of both companies being the same, and getting their remuneration exclusively from the parent. The subsidiary had no staff of its own except a manager who had no access to the books which were kept by the parent. No dividend was ever declared by the subsidiary, its profits were simply treated as those of the parent. The premises on which the subsidiary company's business was carried on was owned by the parent and let at a nominal rent to the subsidiary on a yearly tenancy. The corporation of Birmingham intended to purchase these premises under their compulsory powers, and the question arose whether the parent or the subsidiary was the proper party to claim compensation for disturbance of the business. In the latter case the corporation of Birmingham would have escaped payment altogether because by section 121 of the Lands Clauses Consolidation Act, 1845, no compensation is payable to an occupier whose tenancy does not exceed one year. The parent company argued (1) that their business "embodied their subsidiary company" and that the subsidiary "carried on its trade as a separate department of" the parent so that the rent was "an inter-departmental charge and merely a book-keeping entry"—in other words, they said that the business belonged to the parent which carried it on in the name of the subsidiary. They also tried to establish (2) that the subsidiary were acting as agents for the parent, and that (3) any loss suffered as a consequence of the exercise by the corporation of its compulsory powers would be suffered by the parent directly and not in its capacity as shareholder of the subsidiary.

In deciding in favour of the parent company, Atkinson, J., made use of the ample material on this question contained in a large number of revenue decisions. It appears that the case of *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, has been frequently misunderstood. A company or other corporate entity can act as principal or agent. It can carry on its business as an agent for an individual or for another corporation, and, if it does, the assets and liabilities which appear to be its own are in fact those of the principal. *Salomon's* case establishes that a company does not become an agent of a shareholder by virtue of the mere fact that he controls all or most of its capital. If, however, there is in addition to capitalist control what one may call functional control the question becomes one of fact. If the shareholder (1) treats as his own the profits of the company, (2) appoints the person conducting the business, (3) is the "head and brain" of the trading venture, (4) decides what capital should be embarked on the venture, (5) makes the profits by his skill and direction, (6) is in effectual and constant control, then the company can be regarded as his agent. These criteria, well recognised in revenue cases, were now applied in order to determine the question whether the business carried on in the name of the subsidiary could be regarded in law as being that of the parent. There could be no doubt that the parent had "complete control of the operations" of the subsidiary. In these circumstances the existence of the subsidiary as a separate legal entity could not prevent the judge from treating the business as that of the parent.

The extraordinary wide scope of the conception of agency (which, it

is believed, is a feature almost as peculiar to English law as the trust concept) enables the Courts to get over some of the worst consequences of the fiction of "corporate personality," just as it goes a long way to removing the hardships caused by the absence of the *contractus in favorem tertii*. In implying an agency relationship between shareholder and company the Courts are in a position to draw a border-line between those cases in which the separate "legal personality" can properly be treated as a matter of mere inter-departmental accounting and those in which economic reality justifies full effect to be given to the corporate entity principle. Some of the abuses made by unscrupulous shareholders in claiming the benefit of limited liability may thus be checked, even outside the all too narrowly circumscribed limits of s. 275 of the Companies Act.

It should not be thought, however, that revenue law is immune from the adverse effects of "corporate entity." A recent illustration comes from Canada. In *Pioneer Laundry and Dry Cleaners, Ltd.* v. *Minister of National Revenue*, [1939] 4 All E.R. 254, the question before the Privy Council was whether a company (B) had a right to a depreciation allowance under a Canadian revenue statute. The assets in question had been acquired by company (B) from another company (A) of the same name which had gone into voluntary liquidation. The share capital of company (A) had been controlled by a holding company (J), which had also gone into liquidation, and company B was controlled by a new holding company (H), the shareholders of which were identical with those of (J). After a series of very complicated transactions (which it is unnecessary to describe in detail) involving the liquidation of a number of companies and the shifting of the assets in question through various hands, the situation was, therefore, that the assets had passed from one company to a new company of the same name, and the shares in this new company were held by a new holding company controlled by the same shareholders who had owned the share capital of the holding company controlling the old operating company. No change had taken place in the actual capital interests involved, all that had happened was the replacement of one operating company by another and of one holding company by another. Under the Canadian statute the revenue authorities were at liberty to use their discretion in making depreciation allowances, but the Judicial Committee held that in using their discretion they were not entitled to disregard the fact that the "new" operating company had "acquired" the assets in a depreciated state. The Minister of National Revenue " was not entitled in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company and to inquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company, and not its shareholders."

O. Kahn-Freund.

Foreign Money Debts—Conversion into Sterling

The decision of the Court of Appeal in *Madeleine Vionnet et Cie.* v. *Wills*, [1939] 4 All E.R. 136, lays down that "a creditor in respect of a debt incurred in a foreign currency is entitled, in a suit in our courts, to recover the equivalent in our currency according to the rate of exchange prevailing at the date when the debt became payable."

The defendant, apparently a woman resident in England, became liable to pay to the plaintiffs, a French firm carrying on business in France, the sum of 8,100 frs. for clothes supplied in Paris. The sum was payable in

September, 1936, when the equivalent of 8,100 frs. in sterling was £105 odd. When sued in England in December, 1938, the defendant paid into Court £65 odd, being then an amount sufficient to buy 8,100 frs. The Court of Appeal held that the defendant had not discharged her liability by this payment and the plaintiffs were entitled to receive from her the amount of £105, i.e. the sterling equivalent of her franc debt at the time when payment was due.

In order to appreciate the implications of this important judgment, it is necessary to see it against the background of a number of earlier decisions rendered by the Courts in recent years. It is fundamental that an English Court cannot give judgment for the payment of an amount in foreign currency. Where, therefore, money is payable in foreign currency, it must be converted into sterling in order to formulate the judgment to be given by the English Court. The rule that judgments can only be given in English currency is a rule of English procedure. Its application is, therefore, independent from the question which law governs the relationship between the parties. It is irrelevant whether the proper law of the contract before the Court is English or, as in the present case, foreign, whether the tort for which damages are claimed was committed in England or abroad, or whether the will which forms the basis of a pecuniary legacy in foreign currency claimed in an English Court is subject to English or foreign law.

What is the proper date for the determination of the rate of exchange to be applied to this transformation of foreign currency into sterling? Obviously this question is of decisive importance in a period of vast and rapid fluctuations in the value of foreign currency as well as of the value of sterling expressed in gold. The ideal—from the point of view of justice and fairness to the parties—is that the debtor (defendant) should not derive any profit from the fact that he postponed the payment of his debt or of the damages owing to the creditor (plaintiff), and that the creditor should not be allowed to gain any advantage by delaying his action and by bringing his suit in an English Court.

If the rate of exchange prevailing at the date when the debt fell due or damages became payable is selected for conversion into sterling, substantial justice is done to both parties as long as the *moneta fori*, the pound remains stable. The creditor is not affected by any fluctuation upward or downward of the foreign currency in terms of sterling after the date when he ought to have received his money, and the debtor does not make any profit by postponing his payment. If, however, the pound falls between the date when payment should have been made and the date when the creditor receives his money by execution or satisfaction of the judgment, the debtor has been allowed to make a profit at the expense of the creditor by speculating in English currency in deferring his payment. This latter result could be avoided if, in addition to his ordinary claim for damages or debt, the law allowed the creditor to recover substantial damages for postponement of payment. Such a claim, however, is unknown to English law which takes the view that interest is a sufficient compensation for the loss suffered by non-payment of money during a given period

It has been suggested that the proper date for conversion is not that when payment fell due, but a later date, e.g. the date of the actual (though belated) payment, the date of the writ, or the date of the judgment. If any of these dates were adopted, the risk of depreciation of the foreign currency

would be imposed on the creditor for the time between the moment when he should have received his money and the date selected. He would, however, *pro tanto* be secured against depreciation of sterling, while the debtor might derive an advantage from an appreciation of sterling in the meantime.

It was laid down by the House of Lords in *S. S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544, that in the case of a claim in tort the proper date for conversion is that of the commission of the wrong, at any rate if the claim is "for fixed and definite damage due to the conditions determined at a particular date." The Court of Appeal is said to have decided in *Di Fernando* v. *Simon, Smits & Co., Ltd.*, [1920] 3 K.B. 409, that in the case of a claim for unliquidated damages for breach of contract the proper date for the conversion is that of the breach (though it may be argued that the action in *Di Fernando* sounded in tort).

By the present decision the breach-date rule thus adopted in cases of damages was extended to the case of contractual debts. There had indeed been decisions to the same effect by courts of first instance, and there was a somewhat inconclusive decision of the Court of Appeal in *Lloyd Royal Belge S.A.* v. *Louis Dreyfus & Co.*, [1927] 27 LL.L.R. 288, which seems to suggest the same principle though the point was expressly left undecided. This decision was not quoted to the Court in the case under review, nor is it mentioned in the judgment of Clauson, L.J., who delivered the judgment of the Court. It is analysed in Dr. Mann's book on the *Legal Aspect of Money*, at p. 297.

While the date of conversion is determined by English law, *qua lex fori*, the discharge of a monetary obligation subject to French law is governed by French law alone. In *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451, the Court of Appeal held that the proper law of a contract governs its discharge even if the contractual obligation is already before an English Court. That case was on all fours with the case under review, except that instead of paying a sterling amount into Court the debtor went to France and paid to the French creditors the nominal amount owing in depreciated French currency. This was held to be a good discharge of the obligation and the action was dismissed. If the defendant in the present case had used her £65 to buy 8.100 frs. and taken (or sent? *quære*) them to France, she would have won her case. In other words: the creditor derived an unwarranted benefit from the facts that (1) he sued in England, and (2) the debtor made a technical mistake. It is submitted that the injustice involved in this result is not inherent in the decision under review, but either in the *Le Touquet* judgment or in the principle that the English Courts cannot give judgments in foreign currency. The effect of the latter principle is that, once a monetary obligation is submitted to an English Court, its measurement becomes to some extent a matter of English law. The rate of conversion affects the substantive relation between the parties and thus, by choosing to sue in an English Court, the plaintiff attracts English law to a relationship entirely unconnected with England. Once, however, this principle is accepted, its application should not stop short of a discharge of that obligation out of Court. The combined effect of the *Le Touquet* decision and the present case is to give the debtor the option either to convert at the present rate of exchange by payment out of Court or at the rate of exchange at the time when he ought to have paid by payment into Court, because the former payment is governed by the *lex causae*, the latter by the *lex fori*.

Clauson, L.J., formulated the rule quoted above in such a way as clearly to show that it only applied "in a suit in our courts." Had no action been brought at all, English law would have had no say in the matter, and the defendant might have discharged her obligation by choosing a rate of exchange more favourable to her. This shows again the inconvenience of the encroachment by the *lex fori* on the *lex causae* which is the necessary consequence of preventing an English Court from giving judgment in foreign currency.

Despite its highly technical character, the question under discussion is of great interest to the student of judicial psychology. The effect of the *Volturno*, *Di Fernando* and *Vionnet* cases is the universal adoption of the breach-date rule by the English Courts. As stated above, this rule does justice to the parties as long as the pound is stable, but it may be harmful to the creditor and lead to unfair results if the money of the forum depreciates between the date of breach and the date of judgment. It seems clear that this latter aspect of the matter was not considered by the Courts. Their confidence in the stability of their own currency made them adopt a rule which fulfils its purpose only as long as the pound is stable and foreign currencies fluctuate.

If the Courts are ever faced with the opposite situation, the rule might be revised or the power of giving judgment in foreign currency might be introduced by legislation. Another possibility would be to give the creditors the hitherto unknown claim for damages on the ground of delay of payment.

O. KAHN-FREUND.

Trade Unions

Miller v. Amalgamated Engineering Union. 54 T.L.R. 776

In view of the comparatively few cases bearing on the status of Trade Unions, this case is worth consideration. It was an action by the son of a member of the defendant Union, whose estate he was administering. He asked for a declaration that his father was at the time of his death a fully qualified member of the Union and that he as plaintiff was entitled to be paid the sum of £123 15s. 0d., which he claimed to be due to his father by way of superannuation benefit in arrears. He asked, alternatively, for an injunction to restrain the Union from applying, for the benefit of other members, funds of the Union which should have been paid to him. The defence made by the Union was that it is an unlawful association at common law, that it is a trade union registered under the Trade Union Act, 1871–1927, and that by virtue of the former statute the Court could not entertain the action.

Section 3 of the Trade Union Act, 1871, provides: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." But certain limitations are imposed by Section 4, which states that "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of (*inter alia*): Any agreement for the application of the funds of a trade union (*a*) To provide benefits to members. . . . But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

The question to be decided was whether proceedings could be instituted

apart from the Act, in which case the Court could entertain them, or whether it was necessary to rely on the validity conferred by Section 3, in which case the prohibition laid down in Section 4 would come into operation.

Mr. Justice Morton scrutinised at length the statutory provisions relating to the definition, objects and purposes of a trade union, and emphasised the extreme importance of the rules of a union in determining whether or not a trade union is lawful at common law. In this instance the union's rules impose very definite restrictions on the way in which the members of the union can carry on their trade, and although every restraint of trade is not unlawful, the learned Judge stated that he was satisfied that the Amalgamated Engineering Union is an association unlawful at common law. Moreover, the objects contained in the rules in restraint of trade cannot be separated from the objects which provide benefits to members. The result was that the Court, by reason of Section 4 of the Trade Union Act, 1871, was not able to entertain the action which had been brought for the purpose of directly enforcing an agreement to provide benefits to a member.

In the course of his judgment Mr. Justice Morton stated that a registered trade union must be deemed to be a trade union within the meaning of the Trade Union Acts.

W. A. Robson.

Rating

As was anticipated, the House of Lords has, in *Robinson Bros.* v. *Houghton, etc., Assessment Committee*, [1938] 2 All E.R. 79, upheld the judgment of the Court of Appeal in over-ruling *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630, which case has, for the last thirty years, governed the assessment, for rating and taxation purposes, of licensed houses—for facts see note at 1 *M.L.R.* 163/4. Lord Macmillan, who delivered the unanimous judgment of the House, held that, in arriving at the rent which a hypothetical tenant would pay, regard could properly be had to the rent which competing brewers would be prepared to pay to the landlord of the property—with whom, of course, there was no personal consideration as there was with the tied tenant—bearing in mind that they could either occupy the house themselves by a manager or sublet it to a tied tenant. In the latter case the brewery company would not be the rated occupiers and it is difficult to see how regard could be had to the rent which an immediate lessor would be prepared to pay to a superior landlord. In practice, however, rating authorities will probably get round this technical difficulty by looking to the rent which a hypothetical brewer would be prepared to pay for the premises as a managed house. Like the Court of Appeal, the Lords refused to apply the doctrine of *stare decisis*, *Westminster C.C.* v. *Southern Railway Co.*, [1936] A.C. 511 being followed, on the ground that it would work grave injustice since an unduly low value improperly placed on licensed premises puts an unjustifiable burden upon other properties.

A. Farnsworth.

Effect of Nullity Decree—Mistake of Fact—Unjust Enrichment

The decision of the Court of Appeal in *Re Eaves* (1939), 56 T.L.R. 110, raises several problems of great practical and theoretical importance.

By the will of a testator, his widow, the plaintiff, was to enjoy the income of a trust fund during her life and widowhood. The residue of the estate was to go to the testator's son, who was joint executor and trustee with the plaintiff. After some time, the plaintiff decided to marry again, and accordingly handed over the investments of the trust fund to the son, before the marriage ceremony took place. The defendant converted the funds to his own use. After twelve years of marriage, the plaintiff was granted a decree of nullity, on her petition, and she then claimed a declaration that she was still entitled to a life interest in the fund, on the ground that her widowhood had never been terminated, and the fund had been handed over to the defendant under a mutual mistake.

The Court of Appeal affirmed the decision of Farwell, J., in dismissing the action, and the three appeal judges were, on the whole, in agreement about the grounds for doing so. They all emphasised that the decree of nullity, despite its categorical wording, did not annul the status of marriage with retroactive effect, at least in regard to transactions concluded during the existence of the *de facto* marriage. They also agreed that there was no basis for a claim for recovery of the life interest formerly enjoyed by the plaintiff, or its equivalent. Clauson, L.J., further thought that the plaintiff was estopped from questioning the legality of the transfer to the defendant, having herself led him to believe in the validity of the transaction, through her own action. But Goddard, L.J., doubted the soundness of this ground, in view of the delicate and intimate nature of the reasons which might delay the exercise of the option to ask for a decree of nullity.

The form of the decree of nullity which declares the marriage to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, suggests a complete nullification of the marriage with all its corollary and collateral effects. To apply this in practice, would be manifestly impossible. It would mean, for example, that the authority of a wife to contract for her husband might be cancelled with retrospective effect, thus undoing an unlimited sequence of transactions which might have been concluded on the basis of that implied authority. In the careful analysis of the authorities, which Lawrence, J., made in *Dodworth* v. *Dale*, [1936] 2 K.B. 509, the learned judge came to the conclusion that "on every occasion on which it (i.e. the question of the effect of the decree upon transactions, concluded before the marriage annulled) has been alluded to, the learned judges who dealt with the subject have indicated that transactions which have been concluded, things which have been done during the period of the supposed marriage, cannot be undone or reopened after the marriage has been declared null and void." A similar principle was applied by Farwell, J., in *Fowke* v. *Fowke*, [1938] Ch. 774. On the other hand, it would be impossible to contend that the decree leaves the marriage fully intact up to the moment of its issue. The object of the decree is certainly to "put at rest for all time the question whether the parties were lawfully married and are or are not free to marry again during the lifetime of the other." It would probably be more logical, as Goddard, L.J., suggested in his judgment, to treat impotence as a ground of divorce as in America, instead of having assimilated it to the cases of bigamy, consanguinity, non-age or undue celebration in all of which the marriage is void *ipso facto*, and without necessary intervention by parties and Court. As matters stand, the decree for nullity on the ground of impotence makes the marriage not void, but voidable *ab initio*, and that raises the interesting

jurisprudential problem of what in German Jurisprudence is styled *Grenzen der Rückwirkung* (limits of retroactive effects). That the status of *de facto* marriage cannot be undone in regard to collateral transactions, is certain. Theoretically the best explanation for the adjustment of conflicting interests which the law must provide, is the analogy of the *bona fide* holder in due course. Where the *de facto* status has given rise to rights of third persons who are not concerned with the internal circumstances of the married parties, their *bona fide* rights are protected, and the retroactive effect of the decree correspondingly confined.

The plea of mutual mistake was rejected by the Master of the Rolls on the ground that it was a composite mistake of fact and intention, "of intention in so far as the exercise of an option by the appellant was required before annulment could take place." But it is submitted that this ground would hardly support the decision. Assuming that the understanding was that the marriage would not be annulled when the trust fund was transferred, the understanding would have been that the marriage was a fully valid one, one not susceptible of annulment. To hold otherwise, means to penalise a party for the exercise of an option which the law confers.

On the question of recovery all the learned judges were short and categorical, yet the question is a very interesting one. On the assumption that English law knows no general principle of unjust enrichment, but only specific actions for recovery of money, an assumption probably still broadly correct, although subject to very considerable reservations,[1] it is true that no money had been paid which could be recovered. But English law knows very well how to recover property which should be restored despite many changes in form. *Re Hallet's Estate* (1879), 13 Ch.D. 696, has made that clear, and the case of *Banque Belge* v. *Hambrouck*, [1921] 1 K.B. 335, illustrates it. A bank, in that case, could recover the proceeds of a cheque forged and fraudulently converted by one of its employees, from his mistress, who had paid part of the proceeds put at her disposal into her own bank account. Equity has no difficulty in following a trust fund, through investments, into the proceeds, and on that point the learned judges seem to have been altogether too brief. Assuming a relevant mistake, there is no difficulty in holding that the enrichment on the side of the transferee corresponds to the empoverishment on the other, to take the predominant continental and American formula, applied by Lord Wright in *Brook's Wharf* v. *Goodman*, [1937] 1 K.B. 534 (C.A.). The only difficulty would consist in the change of position incurred by the transferee. The defendant here has spent the money obtained, and in such a case continental systems and the *American Restatement on Restitution* agree that there is a good defence to a claim based on unjust enrichment. English law is very confused on that point, as the conflicting decisions of *Holt* v. *Markham*, [1923] 1 K.B. 504, and *Jones* v. *Waring and Gillow*, [1926] A.C. 670, show. The decision thus seems to confirm that as yet there is no principle of unjust enrichment in English law, beyond the specific actions for money had and received, and, it must be added, the supplementary remedies in Equity, based on the same principle.[2]

W. Friedmann.

[1] Cf. the present author's *Principle of Unjust Enrichment* in 16 *Can. Bar Review*, 247 *et seq.*; 369 *et seq.*

[2] Cf. Holdsworth, 55 L.Q.R. 51; Friedmann, *loc. cit.*

Motor Cars as Dangerous Things. Opportunity of Inspection

The short point of an interesting, but somewhat lengthy decision in *Herschthal* v. *Stewart & Ardern, Ltd.* (1939), 56 T.L.R. 48, was the meaning of that unfortunate test, the "opportunity of inspection" brought up by *Donoghue* v. *Stevenson* and differently interpreted ever since.

The defendants, a firm of motor car engineers, had delivered a reconditioned Morris car to a firm, Utility Products, Ltd., of which the plaintiff was a director. On behalf of that company, he had inspected the car, had trial runs, taken delivery and signed a receipt which stated that the car had been "seen, tried and approved by me" and "supplied on the usual hire-purchase agreement of the terms of which I am aware."

The car was delivered by a servant of the defendant company, who drove the plaintiff for a distance of several miles, without there being evidence of a defect. But the next morning, when the plaintiff took the car out, the rear near wheel came off when he turned, and the plaintiff suffered shock, for which he claimed damages. It was proved that the nuts securing the wheel had not been tightened properly.

There was, of course, no contractual duty between the parties, and the sole ground of liability could be negligence, under the principle of *Donoghue* v. *Stevenson*. The question was whether the claim failed because the defendant had had an opportunity of inspection. The learned judge, after a careful review of a number of cases on that point, came to the conclusion that the better test was not opportunity of inspection in the physical sense, but duty of inspection. It must be asked whether the plaintiff, considering all circumstances, could reasonably be expected to make an inspection, and the learned judge decided that in this case the question had to be answered in the negative. The weight of authority, and, it is submitted, of social justice supports this decision. The social significance of the modern tendency in the law of tort, in which *Donoghue* v. *Stevenson* has played such a powerful part, is the insurance of the public against the dangers of modern mass manufacture and trade. As in all cases of legal liability, the risk must rest with one of the two sides, and it is for the law to decide, in accordance with the principles of social policy which guide it at the time. Modern developments[1] have thrown the risk upon the manufacturer, trader, etc., in relation to the injured member of the public, not absolutely but almost so, if one considers the modern conditions of negligence as stated by *Donoghue* v. *Stevenson* and developed, above all, by *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85. It would be strangely inconsistent if the purely accidental fact whether there was a physical and technical possibility of inspection of the article by the consumer or user, should affect liability. A man who buys ginger beer in an opaque bottle has no such opportunity, a man who buys underwear in a store has. But can anyone seriously suggest that a buyer of underwear should subject it to chemical tests as to sulphur content, etc.? Yet Lord Wright's pertinent observations on that problem were ignored by Hawke, J., in *Dransfield* v. *British Insulated Cables* (1937), 54 T.L.R. 11, where the risk of not testing bullrings supplied in thousands by a first-class manufacturer was thrown upon the buyer, a local authority. The grave consequences of such a decision have been exposed by Professor Goodhart in 54 L.Q.R. 59. The decision in *Dransfield's* case seems now to be isolated, and the learned judge in the present case might well have added to the authorities

[1] See "Modern Trends in the Law of Torts," in 1 M.L.R., pp. 39 *et seq.*

discussed the careful decision by Goddard, L.J., in *Paine* v. *Colne Valley Electric Supply Co., Ltd.* (1939), 160 L.T. 24, which reached the same result in the case of defectively protected electric insulators which caused the death of a workman.

A question not so far discussed by the Courts is whether the injured person and a third party are in the same position with regard to the duty of intermediate inspection. Obviously the legal position is different where the duty is incumbent on the injured person himself from what it is where an intermediate party should have charged himself with the inspection. In the first case the defence is either that there is no breach of duty at all or that there is contributory negligence, or that the chain of causation is interrupted. Where an intermediate party fails to inspect, as in the *Dransfield* case (assuming there was a duty to inspect at all), there is no reason why the manufacturer should be excused, rather than be jointly and severally (or, perhaps, severally) liable with the intermediate party. The present case did not make an examination of this question necessary, but it will undoubtedly come up for decision some time.

W. Friedmann.

Unjust Enrichment as a Defence

The main interest of the decision in *Ayres* v. *Moore* (56 T.L.R. 145) lies in the possibility—discussed by Hallett, J.—of something like the principle of unjust enrichment being used as a defence, and not as supporting an action for money had and received.

The defendant had been induced to accept a bill of exchange by the false representation made by a certain Mr. Fisher that the bills were required to secure advances which the plaintiff had made to him for the purpose of financing the purchase of certain patents for a company of which the defendant was the chairman and director, and Fisher was secretary. In fact the bills were for personal advances. Had it been as Fisher represented, the defendant would have had an interest to accept the bills, in order to prevent difficulties to the company of which he was chairman. He would, however, have been under no obligation to accept the bills.

The defendant was successful on the ground of fraudulent representation, a matter which requires no comment. The defence of mistake the learned judge rejected, on the ground that the mistake must be as to a fact which if true would make the person paying liable to pay the money, not where, if true, would merely make it desirable that he should pay the money. This is certainly the law, as laid down in *Aiken* v. *Short* (1 H. & N. 210, *per* Baron Bramwell, at p. 215) and in *Kelly* v. *Solari* (9 M. & W. 54, at p. 58). But the interesting point is that the defendant used as a defence to an action on an acceptance his alleged mistake referring to his duty to give the acceptance. In other words: he tried to obtain restitution of his acceptance on the ground of his mistake of fact. Had the mistake been relevant, this would have been a case of the recovery not of money had and received, but of an obligation incurred, a *condictio obligationis* as described by Ulpian in D. 12, 7, 1, p. "*Est et haec species condictionis, si quis sine causa promiserit . . . Qui autem promisit sine causa, condicere quantitatem non potest quam non dedit, sed ipsam obligationem.*" For such a use of what is in effect the principle of unjust enrichment the learned judge could not find an authority, but he saw no difficulty in principle, provided

the same rules regarding the nature of the mistake were applied as with the action for money had and received.

The other grounds of the decision require no comment, except the observation that, under section 27 of the Bills of Exchange Act, there was good consideration for the bill, since there was an antecedent liability or debt, namely Fisher's debt to the plaintiff. This would mean that the liability of a third party can be an antecedent liability in the relations between the parties to a bill of exchange.

W. Friedmann.

Dishonour of Cheque—Damages

The short and unsatisfactory judgment of Lawrence, J., in *Gibbons* v. *Westminster Bank, Ltd* (1939), 55 T.L.R. 888, settles, at any rate for the time being, a much discussed point of banking law, namely whether the dishonour of a cheque by a banker carries with it the liability to pay substantial damages only in those cases where the drawer is a trader, leaving aside, of course, cases where special damage can be proved. The general rule that only such amount of damages as can be proved may be recovered is very strictly applied, and the number of exceptional cases will not be extended (*Addis* v. *Gramophone Co.*, [1909] A.C. 488).

Among these exceptions that relating to the dishonour of cheques is of considerable importance and appears first to have been suggested rather more than a century ago by Lord Tenterden in *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, though in that case the point at issue was whether any damages could be recovered at all without proof, the breach of duty having up to that time been regarded as a tort rather than a breach of contract. The case is indeed significant as illustrating the marked tendency which existed at that time to reduce as many mercantile problems as possible to terms of contract. During the ensuing period the law of contract was developed with an eye to the requirements of the mercantile community, and since the expansion of the cheque system made the punctual payment of such instruments a matter of grave concern to business men it is little wonder that Lord Tenterden's hint was taken up and expanded in *Rollin* v. *Steward* (1854), 23 L.J.C.P. 148, so as to establish the rule that a trader whose cheque has been dishonoured may recover damages as if he had been slandered by an imputation of insolvency.

It remained to be decided whether this right was limited to the business community. Curiously enough, in spite of various dicta mostly in favour of limiting the rule, we have had to wait for nearly a hundred years for the solution, meanwhile the problem is known to have caused considerable concern to bankers who have been able to avoid a decision in a number of cases by settlement of claims. In the instant case since the plaintiff had suffered no discoverable damage and was a married woman not likely to be especially discredited by the dishonour of a cheque, the defendants were able to contest the matter on the most favourable set of facts likely to be open to them. The decision of Lawrence, J., justified their conduct. The reasons of the learned judge hardly go beyond the interpretation placed upon *Rollin* v. *Steward* (*supra*) in some of the textbooks (cf. Grant, *Law of Banking*, 7th ed., p. 88; Paget, *Law of Banking*, 4th ed., p. 178), and what appears to be a misunderstanding of *Addis* v. *Gramophone Co.* (*supra*). In that case the House of Lords considered that the number of types of case when substantial damages can be recovered should not be extended, not that the scope of the rule relating to the dishonour of cheques

should not be extended. In fact the rule is stated by the House of Lords in that case in quite general terms, and does not confine to traders the right to recover such damages.

There are, indeed, other classes of citizens whose reputation is just as likely to suffer serious harm from the dishonour of their cheques as are traders, among these are various kinds of professional men such as solicitors and accountants, while in the army it was at one time, and may still be, the etiquette to require an officer whose cheque had been dishonoured to send in his papers. It may indeed be questioned whether the decision of Lawrence, J., in this case is to be regarded as more than *obiter* in relation to persons belonging to classes of those kinds. Even so, however, the relevance of *Rollin* v. *Steward* (*supra*) to the facts of the present day may be questioned. A century ago few outside the business world made use of the cheque system; now every person of any substance, and many of none, has a bank account, and *prima facie* it is a serious blow to the credit and reputation of any one of us to have his cheque dishonoured. There is a good case, therefore, for requiring very great care from bankers in the handling of such instruments, and for keeping them up to their duties by visiting failure with the liability to pay heavily for it.

R. S. T. C.

Insurance on a C.I.F. Contract

The doctrine of the reasonable man, in this case the reasonable business man, plays as important a part, if not a more important one, in mercantile law as in any other branch of English law. In fact, wherever it is applied in connexion with the law of contract it may well owe its origin to the law merchant the incorporation of which into the common law was paralleled by, and only made possible by, the rapid development of a law of contract. The c.i.f. contract for the sale of goods affords a valuable illustration of this point, and is exemplified in an interesting manner by *Oulu Osakayetio, etc.* v. *Arnold Laver & Co., Ltd.*, [1939] 4 All E.R. 88. A c.i.f. price normally of course includes the costs of the insurance, but since rates of premium change from time to time it is not uncommon to provide that any increase over a basic rate which may or may not be the rate ruling at the time the contract is made shall be added to the purchase price. This happened in the instant case. Owing to the increasing danger of war, premiums on policies covering war risks, which was called for by the present contract, had risen substantially by the date the goods came on risk. But on Spanish Government-owned ships which were being sunk by the insurgents the rate rose even more steeply. However, the shippers had chartered for the transport of the goods in question a vessel belonging to the Spanish Government, with the result that a very substantial addition was made to the invoice tendered to the buyers for payment. They refused to pay anything above the rise in the premium rate which had taken place for shipping generally.

It is a well-known rule in connexion with c.i.f. contracts that the seller must make a "proper" contract both of affreightment and of insurance (cf. *Scrutton on Charter Parties and Bills of Lading*, Art. 59). The usual criterion of a "proper" or reasonable contract is that which is usual in the trade, and circumstances even remotely resembling those of the instant case do not appear to have arisen previously. The principle of the thing is clear, however, viz. that "the shippers should act reasonably where they are to take a step which will impose a burden upon their contracting

party" (*per* Atkinson, J., at p. 90). The learned judge was of opinion that the sellers ought not to have chartered a belligerent vessel or any vessel which was so circumstanced as to lead to the requirement of a premium beyond the ordinary schedule rates. He accordingly found that the buyers were not liable to pay more than the general increase in the rate, i.e. they escaped the extra amount payable on Spanish ships.

This reasoning is likely to find general favour. Whether the decision is correct on the facts, however, is perhaps doubtful, as the evidence showed that the Spanish steamer had been chartered some weeks before the sinking of another Spanish Government vessel in the North Sea had first brought about a difference in the premium payable by the Spanish Government and other owners. Surely the crucial date at which the reasonableness of the seller's conduct is to be judged is that when he entered into the contract of affreightment?

R. S. T. C.

The Finance of Hire-Purchase Agreements

The points raised in *Transport & General Credit Corporation, Ltd.* v. *Morgan*, [1939] 2 All E.R. 17 were not, legally speaking, difficult of solution, but the case is well worth looking at because it gives a very good idea of the difficulties attending the highly important problem of financing hire-purchase sales. The methods employed, of which there are two main types, have been described in a number of cases, e.g. by Scrutton, L.J., in *Owen and Smith* v. *Reo Motors (Britain), Ltd.* (1934), 151 L.T. 274, and by Lawrence, L.J., in *In re George Inglefield, Ltd.*, [1933] 1 Ch. 1 at p. 24. There is no need to go into these matters here: further information will be found in Dunstan's *Law of Hire-Purchase*, 4th Ed., Chap. XVII. In substance a finance company is intruded into the hire-purchase transaction in such a way that the retailer who actually disposes of the chattels obtains the whole of the purchase price at once, and is therefore able to pay the manufacturer at once—under the old system one or other had to wait for his money, i.e. to bear the burden of financing the transaction. The finance company now takes over this responsibility and receives the instalments of the hire-purchase price as they fall due. It naturally makes a charge for the service in the form of a charge for interest upon the money advanced. The difference between the cash and the hire-purchase price of an article is, of course, represented by this interest charge. The variations of method mentioned above are concerned with providing security for the finance company. This is naturally a very important matter, and the problem is normally solved by (*a*) making the goods themselves available and (*b*) supporting this by guarantees from the retailer and/or manufacturer. Very frequently the goods are sold by the retailer to the finance company in the first instance, the latter then hire-selling them to the consumer. In this way the company obtains the right to seize the goods should payment fall into arrears.

The importance of this type of development is well brought out by Simonds, J., in the instant case where he says (p. 28) "it must be remembered that hire-purchase agreements play a very large part in the commercial and social life of the community, and the financing of these hire-purchase agreements is an enormous business, both in the City of London and elsewhere." It is not necessary to describe the complicated facts of this case in detail. It is sufficient to say that the manufacturer had become involved in the transaction as a guarantor of the finance company, and that

the action was brought by the finance company against the manufacturer on his refusal to pay up under the guarantee. The retailer which was a company owned by the manufacturer had gone into liquidation, and the action arose in connection with the winding-up proceedings.

Of the defences put up by the manufacturer we may notice two, the one much more important than the other, viz. that the finance company was nothing more or less than a moneylending concern and the whole transaction one of moneylending subject to the provisions of the Moneylenders Acts as regards registration; forms of contract, etc. If this had been so the contract upon which the plaintiff sued would have been unenforceable. But while this type of finance is, like most others, concerned with the lending of money it is not moneylending in the ordinary use of that expression. As Simonds, J., pointed out "the financiers and the dealers co-operate in the common venture of making feasible the whole business of hire-purchase agreements which is now for good or evil, a necessary part of our social life."

It need hardly be said that had this defence succeeded it would have knocked away the foundation upon which the whole superstructure of modern hire-purchase selling has been erected. The lighthearted way in which business people, or their legal advisers on their behalf, in order to gain a personal advantage are content to imperil the very institutions upon which their business depends would be astonishing to any one not acquainted with the jungle life which exists in the modern business world. It may be noted that this is not the first time that the attempt has been made to torpedo the financial arrangements for a hire purchase agreement with equal lack of success (see *Olds Discount Co., Ltd.* v. *Playfair, Ltd.*, and *Olds Discount Co. Ltd.* v. *Cohen*, [1938] 3 All E.R. 275).

The other defence, not less revolutionary in its implications, was that the manufacturers continued to hold an equitable lien over the goods and were therefore entitled to get them back from the retailer notwithstanding a floating charge over his assets which had been granted to the finance company, and which, of course, covered the goods actually supplied by the manufacturer to the retailer. Since the property in these goods had presumably passed from manufacturer to retailer at the time when they were supplied according to the ordinary rules it is a little difficult for a mere commercial lawyer to see any basis upon which an equitable lien could arise, and indeed so far as the report indicates nobody engaged in the case took the trouble to explain this fundamental point from first to last. It is obviously a dangerous doctrine from the mercantile point of view, and one is glad that Simonds, J., found no less than three reasons, each more conclusive than the last, why the contention should be rejected.

R. S. T. C.

REVIEWS

THE RIGHT OF PROPERTY. By VINDING KRUSE. Translated from the Danish by P. T. FEDERSPIEL. Oxford, 1939. Pp. xvi + 495. **20s.**

The author of this book, Professor V. Kruse, plays almost the same part in the development of Danish and Norwegian law as may be attributed to Sir Robert Torrens in the history of Australian Land Law. Kruse is the great reformer and moderniser of Danish Property Law. The *Thinglysning*—that is Publication—Law of 1926 is his work. This law created a new and better system of transfer of immovable rights and a method of making these rights publicly known which differs from the Torrens system, the German registration system, the French methods of transcription and inscription and the English system. Therefore his views on Property Law as a whole are worthy of being carefully studied both in his native country and abroad. His book, which is a contribution to comparative law, to legal philosophy and to the science of Danish law, appeared in Danish in three volumes, the first of which was published in 1929. A German translation appeared in successive volumes from 1931 to 1938. The first volume has now been published in English. The English translation includes some supplements due to changes in legislation. On the other hand it has been shortened, particularly by the omission of notes which refer to Danish legal sources and Danish literature.

The present volume deals in its first part with the foundation and limitations of the right of property, and in the second part with the origin of this right, its "change," termination, "attribution" and protection. The notion of what the author calls "right of property" is not identical with that of Roman *dominium* or of the French *droit de propriété* or of the German *Eigentumsrecht*. It covers a much wider area. It includes all those rights of which the owner is able to dispose. The author takes the word rather in the sense in which it is used in debates on social systems. Indeed, these systems or, more correctly, three of these systems form the starting-point: the Liberal system of private capitalism, the system of Socialism—which in the author's definition embraces all orders of society in which the political power, the State, operates industry or is invested with property, but from which the author excludes the system of State intervention in and regulation of trade and industry (State control)—and Communism, including all those systems which embrace a general human community of industry or property working independently of the State. He reproaches each of these systems firstly with their "wanton and sweeping generalisation" from certain examples to an all-embracing law of nature, and, secondly, with their disregard of all extra-economic value of property rights. Probably nothing the author says on these points will be new to the student of political economy. Everything may have been said, modified, proved, refuted before. Observations, however, which an eminent lawyer makes on subjects bordering on his own carry weight and deserve consideration.

The way in which the author deals with the non-economic elements of property is particularly remarkable. He distinguishes from "economic" property firstly "intellectual" property—such as authors' and artists' copyrights, patent rights, rights of design—and secondly, "spiritual" property. With regard to intellectual property, he stresses the fact that "if the antagonists of private property were right, we should have to

believe that these rights were an obsolete human institution, a creation of the law which had outlived itself," while in these particularly new legal types the idea of private property unfolds "a strange vitality, an impressive power to grow new branches." The author explains this phenomenon by the remark that the "inmost reason of all private property" is to be found in the creation of something new—a statement to which the same objection (of "sweeping generalisation") may be raised as the author raises against the three economic systems.

As to what the author calls *spiritual* property, I do not believe that this conception is on the same plane as material and intellectual property. He means "those forces which socially or individually are of a restraining nature," which, e.g., give "spiritual satisfaction" in the sphere of arts or of home furniture; he speaks of things which have a personal and sentimental value because they belong to a particular family, and the like. It is quite true that feelings of this kind ought to be protected by the law—and they are protected (though possibly within too narrow a frame) by laws which prohibit the seizure of a debtor's wedding-ring, which provide that heirlooms shall pass to the heir of the land, which protect places of historical interest or natural beauty by forbidding alterations which would destroy or diminish the immaterial value or aspect of the landscape, and so on. But I do not think that it is useful to set up the idea of spiritual property in the wedding-ring, the heirloom, or the protected land as apart from the material property in these things. It would seem more satisfactory to assume that there is only one property right which is of a material character, and that the content of this right varies according to the nature of the object, that e.g. the right of free disposal may be restricted in view of the public interest or of the interest of neighbours, and the right of enjoying or using the wedding ring may be strengthened against creditors in the "spiritual" interest of the owner. What the author has in view when he thus distinguishes three kinds of property, becomes particularly clear in his observations on the right to letters (pp. 136, 137). When Kierkegaard sent love letters to the beloved of his youth, he transferred to her the material right of property and retained the intellectual property; and if the addressee had presented the letters to a friend, who thus acquired material property, the original addressee would have retained a spiritual property by which she could have prevented publication, just as the sender could prevent this through his intellectual property. Many objections may be raised against this construction. Does not the sender of the letters, too, retain a "spiritual" property? And if a letter written by A to B reveals the secret of A's adulterous relation to Mrs. C., should not Mrs. C, though the letter has never been in her possession, have a spiritual property in it, according to the author's theory? It would be much simpler to explain all the phenomena mentioned by assuming a right of personality which includes the right to forbid any trespass into the secret sphere of a person, than to affirm the existence of a spiritual property in the letters.

The author wants to simplify legal theory on several points. He eliminates firstly the conception of things or tangible objects (p. 121), secondly, the distinction between rights *in rem* and rights *in personam*. As to the latter point (p. 124) he wants—if I understand him rightly—to make sure that the right *in personam*, too, can be regarded as the object of ownership, of a mortgage or of some other right *in rem*. It cannot, however, be denied that the content of a right *in rem* is very different

from that of a right *in personam*, inasmuch as the former right may be the basis of an action, though not against everybody, at least against an unlimited number of persons. I doubt whether it is true that "debt-claims may quite well be vindicated" (pp. 145, 473). If the debt-claim is incorporated by a document, it can, according to the author, be vindicated by an action against the possessor of the document in the same way as the action may be brought against the possessor of a tangible object. But it must be borne in mind that a document is a tangible object, and that it is this object and not the debt-claim which is vindicated. If there is no document relative to the debt, the author grants a *vindicatio* against the person who actually "exercises the claim, collects interests, etc." Obviously he wants the "possessor" of the claim to be obliged to repay what he has obtained through the exercise of the claim. But even then, it is hardly the claim he vindicates but the tangible objects paid by the debtor to the possessor of the claim, if under the prevailing law of the country the ownership of these objects has been acquired by the creditor—which, for that matter, is neither the case under Roman nor under French or German law.

Rightly the author objects to the definition of the right of property as being a "*formueret*," that is, an economic right ("*Vermögensrecht*"), since it does not apply only to things of economic value. It has, however, never been denied that a right of property on things of no pecuniary value exists, and the property in the curl of the beloved or in the school copy-book of the deceased child have often been quoted as examples. Only in the case of rights *in personam* (claim-debts) has it been asserted that they cannot exist without pecuniary value; but this assumption—which has been based on Dig. 40, 7, 9, 2—is by no means the prevailing doctrine. Nevertheless the inclusion of the right of property in the group of economic rights is, in my opinion, permissible, as legal classifications should not be set up from a merely logical point of view but should start from the most essential social facts; they may ignore peripheral phenomena.

The author's special explanations of the limits of the right of property are of particularly high value and interest. With regard to the differences between expropriation and the general limitations imposed by law on the right of property (p. 174), the author's opinion may be open to discussion. He asserts that limitations imposed by law "in accordance with general objective reasons and considerations" cannot bear the character of expropriations, so that in such cases the private owner cannot demand compensation. I believe that even general limitations are expropriations if the right of which the owner has been deprived by law has been transferred to another person. In cases of this kind it seems equitable to grant to the private owner a claim to compensation against the beneficiary. If e.g. a statute establishes compulsory billeting on all householders having more than a certain number of rooms, it would be unjust to deny them compensation, though the burden imposed on them has been made by way of general limitation of the right of property and in accordance with "general objective reasons and considerations." At p. 179 *et seq.* the author gives a very valuable explanation of Danish agricultural legislation, compared with German and English law. The German translation of Vinding Kruse's work contains, moreover, the author's comparison of Danish Law of land registration with Norwegian, Swedish, Finnish, French, English and German Laws. The English translation omits this.

The author then deals (p. 203 *et seq.*) with the limits of private property in relation to what he calls free nature, that is the sea, the lakes and rivers,

the air and the soil under the owner's land, and, to a certain degree, with the rules on neighbouring properties. He adds some valuable observations on the limitation of private ownership due to hygienic and spiritual interests; he discusses forest protection laws existing in various countries, housing laws and especially the laws concerning the preservation of natural beauty.

The second part, too, is rich in admirable observations, especially in so far as it deals with original acquisition of property. Danish law does not include many distinct rules on the subject, and both the theorist and the judge have therefore a considerable amount of liberty in filling the gaps. The author has of course studied the laws of other European countries, and his remarks show the usefulness of such comparative work for this purpose. When, however, he raises his voice against the distinction between acquisitive prescription (usucapion) and extinctive prescription (limitation), I cannot believe that this reversion to a theory which has been abandoned for over a century by continental doctrine will meet with assent. More original and audacious is what he writes on the conception and the legal effects of possession. He recognises that this conception has done good work in the past, but thinks that now it must be set aside or reduced to a subordinate and auxiliary part in present and future society. I believe he is right.

As a whole, this is one of the most remarkable books in existence on property law, though it does not contain much of what its title would suggest to English readers.

MARTIN WOLFF.

LAW IN THE MAKING. By CARLETON KEMP ALLEN, M.C., M.A., D.C.L. Third Edition, Revised and Enlarged. Oxford: Clarendon Press, 1939. **21s.** net.

Dr. Allen's book has rapidly established itself as a classic, and every student of jurisprudence will have eagerly expected a new edition, after an interval of nine years, which certainly were full enough of developments of juristic significance. Their expectations will not have been disappointed. The new edition represents in every respect the model of what a new edition should be: revised in essential features as well as in detail, carefully noting and discussing every criticism of weight made against views or statements of the last edition, provided, on almost every page, with a wealth of new material, the new edition is, in many ways, a new book, while it retains all the features which made its fame in the first place: a wealth of ideas, profundity of discussion, lucidity of exposition, and, one should add, a modesty in the proposition of views which does credit to the distinguished author.

The best thing to do, for a reviewer of the new edition, is probably to go over the major additions made. They are a completely new introduction on modern tendencies in jurisprudence—the most important one—considerable additions to the chapter on precedents, both historical and on the modern operation of precedent as a factor in the making of law; a short new section on the "equity of a statute"; an excursus on "custom as law" (a reply to a criticism by Professor Dewey); and a very weighty excursus on statutory interpretation. The present reviewer cannot hope to do justice to all or even most of these additions. He must confine himself to some observations on the most important. His gravest doubt, he confesses

frankly and with the greatest respect, is as to Dr. Allen's furtive excursion in the realm of legal theory. Not that he would not be as qualified as any living author to write on this subject. Nor that there is not a very great need for some systematic introduction to the subject, particularly for English students. But even Dr. Allen cannot do the impossible and do justice to the subject in an introduction of 60 pages. This introduction introduces a certain foreign element into a book which is not only mainly concerned with a different aspect of jurisprudence, but above all deals with it with a profundity of learning, and a wealth of material and discussion which has fully justified its great reputation. The introduction is on a different level. It is necessarily summary and generalising. On some of the authors discussed, like the Historical School and Duguit, Dr. Allen gives a full exposition and important criticism in other parts of the book. As for the remainder, the present reviewer would consider the brilliant analysis and criticism of the "Pure Theory of Law" as the most successful chapter, while he would consider the treatment of Stammler, with the greatest respect, as inadequate. Contrary to his usual method, Dr. Allen does not give, the background of Stammler's theory, which is, however, indispensable (in fact, Stammler is incomprehensible without his neo-Kantian basis) nor does he make us see, again contrary to his usual method, what Stammler really meant with his idea of "right Law." Yet Stammler devoted a very considerable part of his work to the application of his theories to the German Civil Law. It would have shown how much Stammler's social ideal, presented in very formal terms, approximates the "balancing of interests" of the sociological school (the account of which mentions neither Holmes nor Cardozo), and how both eventually reduce themselves to certain social and political valuations, which the term of "balancing of interests" merely conceals. That would have provided a transition to what Dr. Allen styles "ideological" jurisprudence, which replaces this attitude of more or less genuine neutrality by a definite hierarchy of values. Perhaps this would have induced Dr. Allen to devote some more attention to this modern trend of ideological or political jurisprudence. Little as Dr. Allen may think of it, it is swaying at present a great part of the world and forms one of the major issues in the present struggle for basic values of civilisation. At the same time some such treatment might have linked up with and thrown some more light upon the admirable addition which Dr. Allen makes in the new edition, by his excursus on statutory interpretation, and, in particular, the problem of social and political valuations in judicial interpretation of statutes. The essential problems which face the modern lawyer, are so very similar, despite the often exaggerated difference between the Continental and the Anglo-American systems. To these criticisms Dr. Allen might reply that there was no space for all this in 60 pages. Our retort to this would be that for this very reason we wish that the introduction, despite its many valuable features had not been added; for Dr. Allen's book, in its main part, comes as near as humanly possible, to exhaustive, learned and original completeness, and the introduction is, in this respect, on a different level.

One of the most admirable features of the book is the abandonment, by the author, of the purely analytical method, not in favour of any other particular school, but in favour of an evenly balanced consideration of the many other factors which contribute to the making of law. The author also repeatedly shows his conviction that initial assumptions must be

separated from logical deductions (this is the principal significance of Kelsen's "Grundnorm," to which the author does not, perhaps, do full justice) and that much clarifies the discussion about the legal force of custom. In his admirable additions to the modern working of precedent and the new excursus on statutory interpretation, Dr. Allen deals fully (perhaps with a certain amount of avoidable repetition) with the many grave problems that confront the modern judge. He does full justice to the influence of considerations of social policy and justice which contribute to modern decisions, but he might perhaps have analysed a little more fully how modern judges (in particular the House of Lords in recent years), without breaking with precedent, select and interpret precedents in such a way as to leave the road clear for the result which they think socially desirable. And how else could the precedent system have withstood the terrific pressure of new social conditions? *Donoghue* v. *Stevenson* has always seemed to the present reviewer particularly much in point. It does, in fact, represent a judicial outlook radically different from the earlier cases which the learned Lords reviewed. The way in which they were distinguished, is hardly convincing from a logical point of view, but the decision essentially establishes a landmark in the distribution of social responsibility. Recent decisions on the scope of common employment, especially Lord Wright's judgments reveal clearly the tendency to deal with precedent, to the utmost stretch of logic, with an eye upon the justice of the case. On the other hand, Dr. Allen deals perhaps too sweepingly with the views put forward by Dr. Jennings, Professor Laski and others about the influence of prejudice in judicial interpretation of statutes (p. 436). No less a judge than Lord Justice Scrutton—the last man to be suspected of sweeping assertions or revolutionary views—has revealed the extent to which judges may be influenced by their prejudices (*Cambridge Law Journal*, Vol. I, pp. 1 *et seq.*) Some comparative observations on judicial interpretations of the American Constitution would further add to the value of this chapter.

On the position of subordinate legislation Dr. Allen has definite views which gain added importance in the light of recent developments. He stresses with renewed emphasis the need for a scientific administrative law to replace the present chaos. Scientific consistency is also his main recommendation for the application of precedent and the interpretation of statutes. But no scientific system can ever be conceived without certain basic social values, from which it is derived. The concealment of these values, conscious or unconscious, has often enough prevented clear insight. No system of law is perhaps faced with greater problems to-day than the English legal system. Will it be able to preserve that continuity of evolution which it has upheld through centuries of great political and social changes? Dr. Allen approaches these problems with what one might call the outlook of an open-minded and progressive conservative. While criticising much that is illogical, or obstructive in the attitude of the judiciary towards the interpretation of statutes, and in particular the frequent tendency to interpret a statute not in the light of its purpose, but with some rigid common law technique—a criticism endorsed, for example, by Lord Wright in *Rose* v. *Ford*, [1937] A.C. 826, Dr. Allen believes in the essential soundness of the English precedent system, as long as it is tempered with the liberal spirit of the great judges, and he thinks that it will continue to be an adequate instrument for the evolution of law, accompanied by the "steady if measured stride" of legislation.

One wonders what influence the social developments hastened if not created by the present war will have upon the steadiness of the evolution. The tremendous increase of legislation, as an expression of growing state control, the further spread of executive as against parliamentary power, the threat to many fundamental rights of the Common Law, through the continuous increase of planning and collectivisation, and, with it the growth of administrative at the expense of the private law which was the sphere of the Common Law, all these factors will affect the development of English Law more powerfully than anything previously known. It is idle to speculate on the future. No one who has studied this admirable work can fail to be aware of the essential issues.

W. Friedmann.

MONEY IN THE LAW. By Arthur Nussbaum. Chicago: The Foundation Press, Inc., 1939; pp. xxxvii + 543; **$7.50.**

When Professor Nussbaum's book, *Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts*, appeared in 1925, it had an immediate success, because at that time there was no treatise which could serve as a reliable guide through the mass of legal problems brought about on the Continent by the monetary chaos of the post-war period. It was, it is believed, translated into the Spanish language, and although, subsequently, the books of Mater (1925) and Ascarelli (1928) appeared in France and Italy respectively, it retained its value as the indispensable starting point for any further research work on monetary questions. But the learned author who, it is no exaggeration to say, is probably the foremost authority on that important, but somewhat neglected part of the law, did not remain idle and when the depreciation of sterling in 1931, the abrogation of the gold clause in the United States of America and many other countries and the introduction of exchange restrictions in so many parts of the world gave rise to numerous new problems, Professor Nussbaum, now enjoying the leisure secured by the Columbia University's hospitality, set out to re-write and re-edit his book. Incorporating a number of preparatory articles such as "La Clause d'or," *Recueil des Cours*, 43 (1935) 559; "The Gold Clause," 44 (1934), *Yale L. J.* 53; "Basic Monetary Conceptions in Law," 35 (1937), *Mich. L.R.* 865; "The Law of the Dollar," 37 (1937), *Col. L.R.* 1057; "Multiple Currency and Index Clauses," 84 (1935), *Pennsylvania L.R.* 569, and adding much further material, he has now presented his new work to the Anglo-American world.

Having regard to the distinguished author's record it is hardly necessary to say that its richness of thought and material is bound to secure to this book a leading place in the legal literature of all nations. There is no monetary problem which is not dealt with, and even such somewhat remote matters as Bank Deposits or usury laws are included. There is hardly a decision of any Court, however inferior and unrepresentative it may be, and not much legal literature which is not dutifully collected, though one cannot help feeling that such writers as Martin Wolff, Rabel, Neumeyer, Piret have received less than the author's full attention. Nor is there any paragraph where the views propounded will not be found stimulating, original and, very often, attractive.

In his Preface Nussbaum states that his work "aims at analyzing and determining the universal principles that underlie the law of money. Use of the comparative method is indicated for that purpose. . . . The view

is taken that the basic monetary problems of developed economic systems are substantially the same throughout the world." Nobody will find fault with this programme. But it involves dangers which have not been entirely avoided. Thus his search for the "universal principles" has very frequently led the author to refrain from making it clear whether his statement applies to one legal system or to all laws, and to make it appear that a rule or a decision obtaining in a particular country has universal validity. The same method probably accounts for the surprising lack of differentiation between private international law and municipal law or for the often indiscriminate use of cases relating to foreign currency for the purpose of establishing points concerning the domestic money and *vice versa*, or for the free criticism of foreign rules of law which a lawyer writing from the standpoint of a particular legal system should avoid but which a writer aiming at alleged universal principles is only too apt to allow himself. The latter point is also due to another object which in the Preface is explained as the "search into the attitudes of the judiciaries of the leading countries in monetary questions; controversies which, because of their social and political consequences, present tests of the competence and impartiality of the courts. In this sense the present study may be said to constitute a comparative inquiry into justice as well as into law." This attempt produces such remarks as that the House of Lords' decision in *Banco de Portugal* v. *Waterlow & Sons*, [1932] A.C. 452, "is a splendid example of entire impartiality; as such, it is, perhaps, even more gratifying than a judgment which is only juridically correct," or that the Court of Appeal when it applied English law in *International Trustee for the Protection of Bondholders* v. *The King*, [1937] A.C. 500, set "another example of judicial straightforwardness in a very tempting situation," while "over-emphasis on the pledge-clause . . . enabled the House of Lords to avoid the disadvantages which would possibly have resulted in the future had they placed their decision on broader legal grounds."

It would be disparaging to attempt to deal in a review of a really momentous work with matters of detail (such as the frequently perplexing arrangement or the misleading quotation of decisions in support of contentions which, on examination, they do not appear to establish at all, or the occasional vagueness of language or the inclination to generalise) or to quarrel with the author's carefully considered opinions. For those who know his previous writings it may be sufficient to say that in respect of all questions of fundamental importance he has remained true to his established methods and principles. We find the definition, if definition it be, that money is "a thing which, irrespective of its composition, is by common usage treated as a fraction, integer or multiple of an ideal unit" (p. 5). There is still the obscure phrase that "the essence of nominalism consists in the arithmetical relationship of a given money to the pertinent ideal unit (dollar, franc, etc.)" (p. 16), and also the really untenable doctrine that "it is ultimately society and custom that decide whether coin and paper will function as, and so be (*sic*!) money" (p. 28). The existence of adaptable debts (p. 255) is still alleged nor has the author given up the fight against the "Tantalus interpretation" of gold clauses which refuses to include a gold value clause into every gold coin clause (pp. 351 sqq.).

But the probably larger group of those who, particularly in this country and in America, have hitherto regarded money as a fact rather than a legal problem and are not acquainted with writings on the law of money, can only be recommended to study a work which is bound to

fill them with admiration and which, if read with a good deal of criticism will exercise a wholesome influence on legal thought, promote useful discussions of monetary problems and even provoke some much-needed changes in the law. Like this reviewer, every reader will gratefully acknowledge the debt which all students of the law of money owe to a much respected master.

F. A. Mann.

THE LAW OF THE CONSTITUTION. By A. V. Dicey, K.C., Hon. D.C.L. Ninth Edition, by E. C. S. Wade, M.A., LL.D. 156 + 681 pp. Macmillan & Co. **15s.** net.[1]

The first question which must be faced in reviewing this new edition of Dicey is whether new editions of such accepted classics are advisable. The balance of the Constitution, as Dicey saw it, is gone. It was going rapidly, even so long ago as 1914, when the eighth edition, prepared by the author himself, was completed. To-day, therefore, Dicey belongs rather to constitutional history than to constitutional law, and the student's main difficulty, in dealing with this excellent edition, is to grasp how much of Dicey's edifice, even when reinforced by some magnificent underpinning by Dr. Wade, remains. The student's task will be by no means easy, for Dr. Wade's Introduction runs to 156 pages, and is so concise that it might well have been twice that length. The distinguished editor has been too modest. He could have written a book worthy to stand beside Dicey's—as mature and as scholarly, instead of concealing himself behind the covers of what will always remain a notable edition. We have had Dicey—and Dr. Jennings' audacious assaults upon him; and Dr. Wade, with his effortless style which reflects deep thought, would have restored the balance.

The first edition of Dicey appeared in 1885. The eighth was printed in 1914, although published in the following year, and now Dr. Wade's edition is dated 1939. There is a notable coincidence in the last two dates. Dicey had been uneasy about the rule of law for some time prior to the eighth edition, as Dr. Wade shows in his preface. The war of 1914–1918 dealt it a blow from which it failed to recover. Dr. Wade's "Introduction" not only shows how far the constitution has changed since then, but an awareness of how very much further it may be compelled to change. Already it is plain that it can never be again what it was when this edition was published. Let us hope that future developments will reflect the tolerance and love of liberty which both author and editor possess in such liberal measure. Our constitutional settlements in the past have been due to a capacity to avoid extremes, and to an attachment to real values, as distinct from abstract logic. We are going to need both in the near future.

There are many memorable pieces of incisive reasoning and concise statement in this Introduction—and there is no spurious optimism. "The price paid by Coke and his followers for their alliance with Parliament, which ensured the defeat of the Crown's claim to rule by prerogative, was that the common law could be changed by Parliament, but by Parliament alone" (p. lxix). A good deal of constitutional history is summed up in that short statement, and one regrets that Dr. Wade had not more space at his disposal to consider more fully Coke's part in the struggle against the

[1] Dr. Jennings will contribute a review on the same book in the next number.

prerogative. Similarly, the editor's observations on feudalism have particular point at a time when many nebulous theories of federal associations are current. Have the enthusiasts realised that any adhesion of this country to a federation would almost certainly necessitate a written constitution, and would obviously destroy the sovereignty of Parliament? It may well be that these things are desirable in themselves, but their achievement would imply vast changes. On the other hand "the advent by constitutional means of the totalitarian State can be more readily achieved by a Parliament which has power to destroy as well as to create the whole framework of government by a simple Act or series of Acts" (p. lvii). Yet at the same time the existence of the federal constitution may prevent the achievement of reforms which are overdue, or which may be necessary to avert a national disaster. Haunted alike by the threats of a constitutional dictatorship and by a federation of powerful interests, we at present walk uncertainly, but with increased watchfulness.

Another point on which the Editor comments acutely is the identification of the interests of one party with those of the State, the necessary result of which is that opposition is deprived of its proper status, and is adroitly exhibited as something merely factious. It may be that in the long run this will do more to undermine the stability of our constitution than any other single factor.

There are many other illuminating and terse summaries of present tendencies upon which much could be said; but the conclusion remains that Dicey has been fortunate in his editor.

G. W. KEETON.

ARNOULD ON MARINE INSURANCE. Twelfth Edition by R. I. SIMEY and G. R. MITCHISON. Pp. xcix + 1936 (with index), two vols. London: Stevens & Sons, Ltd. **£5** net.

It is fifteen years since the Eleventh Edition of Arnould appeared; too long a gap, since this is the only authoritative work on the English law of marine insurance. Mr. Mitchison joins Mr. Simey who had for so many editions collaborated with the late Mr. de Hart. The new editor is well equipped for his task both by practical experience of the administration of the law, and grasp of the principles of this branch of insurance. Judged by conventional standards the work done upon the new edition is of a high order. Those aspects of the subject which have been particularly discussed in the Courts such as constructive total loss of freight, and deviation receive careful treatment, though the editors drily remark in their preface that "much uncertainty still exists" on these topics. Certain practical matters have received attention, and space has been found for many of the Rules of the Institute of London Underwriters in accordance with which the bulk of modern marine insurance is underwritten, the neglect of which was a serious omission from earlier editions. Every relevant case and statute appears to have been noted up.

Could anything more have been asked? Frankly we should like a new book, or a fundamental rewriting of the old one. For the period of its appearance (1848), Arnould was a really remarkable book. The author who was a fellow of his college and became a judge in India had an unusual interest in comparative jurisprudence, and carried on the tradition of learning which had been established for the law merchant by Lord Mansfield. His bibliography contains a reference to every continental and

American work of note which had appeared in 1848. To judge by the additions made by the successive editors no works of any importance relating to this subject have been published on the Continent since that time! But while Arnould's achievement was a remarkable one, one which has been considered good enough for practitioners ever since, it was conditioned by the state in which legal science found itself at that time. No really scientific analysis of the concepts of contract law had been made, and the jurisprudential basis for really first-class textbooks was lacking. Since then the whole subject has been revolutionised by the work of Pollock, Anson and Salmond in this country, as well as well-known authorities in the U.S.A. But all this has passed over the heads of successive editors of Arnould. To take one and an important example the subject of misrepresentation is one of great importance in marine insurance which at an early stage developed some rules of its own on the subject. It has never been clear how far these are still valid in the light of the modern doctrine laid down in *Derry* v. *Peek* (1889), 14 App. Cas. 337. The whole subject would repay careful analysis, but there is only a casual reference to that famous case in a footnote, and while the editors appreciate that the early rules are not perhaps in accord with modern ideas no real attempt is made to restate the law in accordance with present day doctrine.

The importance of the Institute Clauses has already been referred to. The history of these clauses is of great interest, and they mark perhaps the most important development in modern marine insurance. No writer sitting down to prepare a treatise on the subject could fail to devote much attention to their elucidation and to an explanation of the part which they play in present-day law and practice. But in Arnould they are very much taken for granted. Less than half a page is devoted to showing how they came to be in, or on, the Lloyd's policy, and while those that have been the subject of judicial decisions are referred to here and there in the text there is no attempt at a systematic exposition of the scheme of the different groups of clauses, nor to relate them scientifically to the body of the policy.

The immense learning contained within the covers of Arnould makes it unlikely that it will be superseded, and this century-old textbook will probably go on to its bicentenary. It has become a sort of vested interest, and one which will always have its value. Yet how much one could wish for a new scientific treatise on marine insurance written with the knowledge and outlook of 1940.

R. S. T. C.

FUNDAMENTAL PRINCIPLES OF TAXATION IN THE LIGHT OF MODERN DEVELOPMENT. By Sir Josiah Stamp. Macmillan & Co. Ltd. 1937. 215 pages. **10s. 6d.**

This book, a new and revised edition of a series of lectures, first published by the author in 1921, is written in that plain style which is expected of Sir Josiah but which at times is so concise and laconic as to be almost obscure. Generally, however, the book is capable of understanding even by lawyers who have no special knowledge of the effects of taxation on the individual, the state and the community.

Quoting Adam Smith's four fundamental principles of taxation the author observes that while they are indisputable they are inadequate in

the light of recent experience. One at least the present reviewer feels he is obliged to repeat: "the tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be plain and clear to the contributor and to every other person." Having regard to some recent efforts of the Legislature in successfully preventing the creation of the "educational trust" for children (Finance Act, 1936, sect. 21) we wish that Sir Josiah had directed some space to the problems created for the taxpayer by the intricacy of the Finance Acts. But perhaps the words used to make taxation part of the law are not his concern; he deals rather with methods of taxation, showing by a diverse range of examples how different taxes have had quite different results from those intended, how through experience Government, so it seems at least in England, is in a far better position than is thought, to estimate just what effect a new tax or an increase in tax will have on the community, how some taxes hamper or assist Government in its task of finding money and how they advance or retard economic progress.

It becomes more and more obvious that the economic organisation of a country is a matter which cannot be left to the free play of demand and supply, and that so long as governments decide on a large measure of state spending, taxation will play an increasing part in the national life. That makes it necessary for lawyers to consider problems in the solution of which Sir Josiah's book may give them some assistance.

S. H. E. Burley.

WHARTON'S LAW LEXICON. Fourteenth Edition by A. S. Oppé. *Barrister-at-Law*, London. Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1938. **£2 10s.** net.

OSBORN'S LAW DICTIONARY. Second Edition. By P. G. Osborn, LL.B., *Barrister-at-Law*, London. Sweet & Maxwell, Ltd. 1937. **15s.** net.

New editions of these two well-known law dictionaries have appeared almost simultaneously. Wharton's is by far the more ambitious, voluminous and expensive of the two. It claims to be not only a dictionary, but an Epitome of the Laws of England under Statute and Case Law. The former task it fulfils admirably, giving as it does an immense number of titles not only from English, but also from Civil, Scots and Indian Law. The latter task, however, it fulfils in an uneven, and, to some extent, inadequate manner. There appears, on the whole, to be a distinct superiority of the titles dealing with the Chancery side over those dealing with the Common Law side. The titles on Real Property, which had to be entirely rewritten since the last edition, owing to the new legislation, are clear, accurate and as complete as possible within such limited space. But on the Common Law side there are some remarkable errors. Under Negligence it is suggested that the division between gross, ordinary, and slight negligence would be a good classification (for English Law!). The selection of decisions quoted in this and many other titles is very questionable. One source of weakness is that in titles which comprise Civil and English Law (e.g. Hire) there is no clear indication what is part of the one and what of the other. The title on "Quasi-Contract," consisting of two

lines, is misleading and the titles on "Conflict of Laws" and "Renvoi" are incomprehensible. The task of mastering material of such diversity is well nigh insoluble for any one man. The shortcomings in some parts should not lead the reader to underrate the wonderful achievement of the whole. But it is submitted that Wharton's might gain in value by ceasing to be an Epitome of English Law as well as a dictionary. Few people are likely to turn to a Law Dictionary for the former purpose, and it is hardly possible to give an adequate all round epitome in the available space. If, however, the present scope is maintained, it might be suggested, with all respect to the learning of the editor, that, for certain matters which require special knowledge, such as Conflict of Laws, the co-operation of experts should be secured.

Osborn's much less ambitious attempt has quickly won well-deserved recognition. It does not claim to give more than a definition and explanation of legal words and phrases, and it does that very well. The author in the preface apologises for having to omit most of the summaries of leading cases which appeared in the first edition, in order to make room for many additional titles and additions to existing ones. This appears to be all to the good. Other works give leading cases, and this is hardly a task which could be fulfilled by a law dictionary without prejudice to its proper function. It is, of course, only fair to say that Wharton's contains a great number of titles, especially of historical importance, for which there is no room in Osborn's.

Thus, both dictionaries fulfil their distinct purposes, and thanks are due to the editors for their labours which must be as painstaking as they certainly are useful to students, research workers and practitioners.

W. FRIEDMANN.

GIBSONS PROBATE LAW. Thirteenth Edition. By A. WELDON, H. G. RIVINGTON, and L. C. WARMINGTON. ix + 180 pp. **15s.**

GIBSONS DIVORCE LAW. Revised Thirteenth Edition. By A. WELDON and L. C. WARMINGTON. iii + 269 pp. **15s.**

Gibson's Probate and Divorce has in its thirteenth edition disintegrated into its component parts with great profit except to the student who has to expend fifteen shillings on each of two slender volumes. The most radical changes occur, of course, in the Divorce Law. The thirteenth edition appeared before the Matrimonial Causes Rules, 1937, had been published and the whole edition was withdrawn for revision. As so revised the text is completely up to date incorporating all the changes brought about by the Act and Rules of 1937. The treatment of the subject is rather more detailed than in the earlier editions, having regard to the greater importance given to Divorce as an examination subject in the New Syliabus for the Solicitors' Examinations. The learned authors have pointed out the many difficulties in the new law and have given valuable guidance as to the probable solution of these difficulties.

By contrast the Probate Law has needed very little revision and the authors have contented themselves with incorporating a few cases which have been reported since the last edition.

E. WYNDHAM WHITE.

REVERSION CONVEYANCING PRACTICE AND LAW. By A. V. Risdon. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. pp. iv + 367. **30s.** net.

This is not a work of immense erudition such as *Withers on Reversions*, but is designed to assist solicitors in all matters of conveyancing practice relating to policies of assurance and to reversions and other interests under wills and settlements. It consists of various precedents of questionnaires and correspondence with detailed notes, the preparation of which has obviously required a great deal of careful work upon which the author deserves congratulation. The result is a book which should prove useful to solicitors when dealing with this extremely difficult branch of practice. Happily the nature of the work gives little scope for the excessively racy literary style in which the author indulges in the introduction and which is quite unsuited to a legal textbook.

DEATH DUTIES FOR STUDENTS. By G. M. Green, LL.B. (London). Assisted by B. L. Purkis. London: Butterworth & Co. (Publishers), Ltd. pp. xix + 166 W (11). **7s. 6d.** net.

The need has long been felt for an elementary introduction to this extremely difficult, extensive and intricate subject. This need has become particularly acute in view of the increased importance placed upon the subject by the new regulations for the Solicitors' Final Examinations, and happily it has been satisfied by this admirable little book. In it the student will find a clear and readable account of general principles and a short summary or an indication of the existence of the less important or more specialised rules and exceptions. Not only will it give him all he requires for the purposes of the Solicitors' Final Examination (for which it is a recommended textbook), but if he has mastered the general principles which it expounds he should be far better qualified than previous generations of lawyers to grapple in practice with the highly technical and obscure statutory provisions and the cases interpreting them with which he will have to deal almost every day. The profession are indebted to the learned authors for writing this book and for writing it so well. It is suggested, however, that when a second edition is required the authors should improve the index which is inadequate.

COMPANY LAW. By Albert Crew. Fourth Edition, 1938, by the Author and W. G. H. Cook, LL.D. (Lond.). London: Butterworth & Co. (Publishers), Ltd. pp. xxv + 374 W (39). **7s. 6d.** net.

This book is primarily intended to supplement the law lectures which business men and commercial students attend for the purpose of preparing for the various professional or public examinations in Company Law. It consists of the annotated texts in full of the Companies Acts, 1929, and of the various Companies Clauses Acts, with notes and definitions of terms and an appendix of specimen examination questions. The beginner who attempts to use it as an elementary textbook is to be pitied for he will undoubtedly suffer the acutest pains of mental indigestion. But it doubtless proves useful as a supplement, for it certainly contains an immense amount of information in a cheap and convenient form.

L. C. B. Gower.

ANNUAL SURVEY OF ENGLISH LAW. 1938. By the Departments of Law and International Studies of the London School of Economics and Political Science. Published for the London School of Economics and Political Science by Sweet & Maxwell. 1939. Price **10s. 6d.**

If the Annual Survey did not exist, it would certainly have to be invented. Students and teachers and, one must hope, practitioners alike can hardly do without this excellent, comprehensive and always interesting survey of every branch of law. That is, provided the right use is made of it, not as a substitute for the reading of cases and literature, but as a first guide and reference book of invariable reliability. But the Survey has gradually developed beyond a reference compilation. There is more and more an element of cautious, but nevertheless effective criticism, where the author of the section deems it necessary. The extent and vigour of the criticism varies in the different sections, but, to take only one example, the well justified criticism of the very weak decision in *Daniels* v. *White & Tarbard* (p. 190) in the section on Tort is exhaustive despite its brevity. We hope for many more volumes of the Annual Survey.

TABELLEN ZUM INTERNATIONALEN WARENZEICHENRECHT. Vol. V. Edited by Justizrat Dr. Magnus. Verlag Rohrer. Bruenn, 1938.

The present volume is the fifth of a very remarkable series of works compiling the law of all countries on various branches of the law. Under uniform headings, the law is set out, in the form of tables, concisely, but nevertheless in great detail, for every country, in alphabetical order. It is thus possible to find out, within a few moments, whether and in what form it is possible to assign trade marks in Canada or Spain or anywhere. Work of such kind demands infinite energy, organisation, patience, knowledge and a great amount of international collaboration. Dr. Magnus, in this, as in previous volumes, has succeeded in all these requirements, and he has secured the collaboration of distinguished lawyers from all over the world. Science and practice of International and Comparative Law owe him a debt of gratitude. It is sad to reflect that, first the Nazi regime in Germany, and now the war in general have probably brought this highly important work to a temporary end. A world which wants to rebuild international contacts and relations will need works like these in the necessary task of simplifying and, to some extent, unifying international legal relations. Previous volumes of this series, especially those on International Civil Procedure, Copyright and the Law of Nationality, will be no less useful than the present one, and, it is hoped, be translated or re-edited in English.

The present volume appears to be very carefully done. One point of arrangement: One cannot understand why Canada should have been separated from the other Dominions and thus treated as if she had no connection with the British Commonwealth of Nations.

KEITH ON CONSTITUTIONAL LAW. 7th edition of Ridges' *Constitutional Law*, by A. Berriedale Keith, D.C.L. London: Stevens & Son, 1939. Price **25s.** net.

The new edition follows very closely upon the sixth, and, owing to further changes, Professor Keith has now substituted himself as the

author for the original author. Certainly every work of importance is bound to be impressed more and more, in successive editions, with the personality of the editor, and whatever policy the editor may adopt in regard to preserving the name of the original author, it is no use trying to superimpose glosses upon the original work. The unfortunate method adopted in the ninth edition of Salmond's *Jurisprudence* shows this, in contrast to the opposite method adopted by Dr. Stallybrass in Salmond's *Torts* and by the present author.

The present edition makes Keith the most up to date of the textbooks on Constitutional Law. For the internal British Constitutional Law many students might prefer Wade and Phillips, and, for certain general problems, Wade's new edition of Dicey's *Law of the Constitution*. But for a detailed and accurate account of the constitutional law of the British Empire as a whole, Keith is indispensable. And this is certainly a point of particular interest at the present time. In a long preface, the author gives a brief account of important constitutional events up to June, 1939. He sees many of them in the light of his personal convictions, although criticism is more tempered than in the same author's "Cabinet." But then it is almost impossible for any author to interpret Constitutional Law, especially in a critical period, without a political bias of one sort or another. With Professor Keith one always knows where he stands, and that is preferable to the disguised political bias of other authors.

W. F.